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No. 06-__

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a Secured Creditor May Refuse to Release Its Liens Even After Repayment? This novel question was published by counsel for Citizens Bank of Massachusetts ("Citizens") in the May, 1997 Edition of *The Bankruptcy Strategist* * * * citing therein Petitioner Bahig F. Bishay ("Bishay") as the first test-case to said experiment. This novelty became the law of the case *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96). [Pet. App. 11a-14a].

II. Whether a confirmed plan of reorganization: (a) should have been considered by the below courts to have been a binding "*contract*" between Bishay as debtor, on one hand, and Citizens as creditor, on the other hand * * * particularly since Citizens drafted the confirmed plan at issue; (b) whether Citizens breached said contract; and (c) whether Bishay should have been permitted to reap the fruits of the contract at issue, which, among other things, empowered Bishay to challenge the law Citizens managed to conjure-up in the bankruptcy court case *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 * * * a precedent that is contrary to public policy and fair lending practices * * * and its architecture is potentially detrimental to millions of secured-loan borrowers * * * as cited above? [Pet. App. 1a-10a].

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bahig Bishay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-4a), which, in essence, sanctioned earlier rulings made by various state and federal courts that prevented Bishay from challenging the lender's refusal to release its liens on Bishay's real property even after the lender received 100% repayment of the outstanding debt, including interest, fees and costs as of the date of the repayment, *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96). [Pet. App. 11a-14a].

The United States Appeals Court for the First Circuit mistakenly concluded that Bishay was attempting to get a second bite at the same apple but, in fact, Bishay never had his first bite as explained herein.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 1123(b)(3) provides in relevant part:

> [A] plan may * * * provide for—
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.

STATEMENT OF THE CASE

It was Citizens' novel question presented herein (Question-I above): "*May a Secured Lender Refuse to Release Its Liens Even After Repayment*", which drove Bishay to bankruptcy in 1995 and kept him in bankruptcy for five years, notwithstanding that Bishay was perfectly solvent with more than $20.0 million in assets when he sought protection only to stave off over-aggressive collection tactics launched by Citizens immediately following its acquisition of Neworld Bank, which included a substantial loan portfolio. The Bishay loan balance at the time this controversy erupted was approximately $1.5 million, which was secured by approximately $20.0 million in assets Bishay pledged to Neworld as security for the loan at issue. Despite Bishay's offer to repay 100% of his $1.5 loan balance, plus interest, fees and costs as of the date of the repayment, in the summer of 1995 (prior to Bishay's bankruptcy filing) Citizens informed Bishay that unless

he was willing to execute a "general release", in addition to the full repayment of the loan at issue, Citizens was not going to release its liens on all of Bishay's assets because it decided to hold said assets, indefinitely, to fund its future, hypothetical defense costs in connection with any claims Bishay asserted, prospectively, against Citizens, its officers and its owner (currently the Royal Bank of Scotland). Bishay advised Citizens that such demand bordered on racketeering; was at stark contrast with public policy; and should not have endured for one day. Believing that the system ought to protect Bishay through a temporary Chapter 11 bankruptcy filing to allow Bishay to pay all of his creditors, including Citizens, 100% of his outstanding debts in 1995, at the same time to stave off Citizens' over-aggressive practices, regrettably, however, the system failed Bishay as Citizens managed to sway the bankruptcy court to allow it to retain its liens on Bishay's assets, even after full repayment was made in 1996 in the bankruptcy court. Citizens then published its article listed above in Question-I. Bishay, on the other hand, explained to Citizens why he was unwilling to execute the "general release" Citizens insisted upon as a prerequisite to releasing its liens, which was in addition to 100% repayment of the loan at issue. This, Bishay explained to Citizens, was due to his uncertainty of the exact amount of quantifiable damages he and his business had suffered after Bishay had notified his investors in connection with a then pending Initial Public Offering ("IPO") that he had been faced with protracted litigation with Citizens. Needless to say, the IPO efforts were immediately halted as result of this epic. The confirmed plan of reorganization allowed Bishay to substitute Citizens' liens with $500,000 in cash, above and beyond the total balance owed and paid to Citizens—which may, in due course, be determined by this Court to have been uncon-

stitutional on its face. The plan of reorganization at issue was drafted by Citizens and stated as follows:

> *The Debtors' estate may retain and, by its duly authorized representative(s) settle, release or prosecute*[1]*, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims"). However, the Alleged Claims, until and unless reduced by Final Order to a judgment against Citizens, shall not reduce, delay or otherwise interfere with the timely and satisfaction of Citizens' Class One Claim in accordance with this Plan. In addition, until Citizens' actually receives (in form and substance reasonably acceptable to it) a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claim; provided, however, (a) that the Debtors may obtain the discharge of such liens within (30) days after the date on which the Class One Claim has been paid in full (but in no event later than January 31, 1997, by delivering to Citizens (i) an irrevocable letter of credit (in form and substance reasonably acceptable by Citizens) issued for the benefit of Citizens by a reputable domestic commercial bank in the amount of $500,000 subject to being drawn by Citizens by presentation of a sworn statement that a court of competent jurisdiction has determined that Citizens has the right to recover costs or expenses (including, without limitations, attorneys' fees or expenses) incurred in*

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[1] Webster's New World Dictionary defines the meaning of the term "PROSECUTE" as follows: "1 to follow up or pursue (something) to a conclusion *[to prosecute a war with vigor]*; 2 to carry on; engage in; 3 a) to institute legal proceedings against, or conduct criminal proceedings in court against b) to try to get, enforce, etc. by legal process *[to prosecute a claim]*—vi. 1 to institute and carry on a legal suit 2 to act as persecutor"

connection with defense of the Alleged Claims in an amount equal to or greater than the amount of such draw, or (ii) a bond (in form and substance reasonably acceptable to Citizens) issued for the benefit of Citizens by a reputable domestic bonding or insurance company securing such possible right of recovery up to a sum of not less that $500,000 . . . At any time, the Debtor or the Consummation Agent may settle the Alleged Claims, subject to Court approval after notice to the Debtors and other parties in interest."

Citizens later represented to the state court that Bishay's claims against Citizens had been settled in the bankruptcy court, when Citizens knew they were not. Citizens also represented to the state court that it was entitled to draw the $500,000 Bishay had placed in escrow so that if after Bishay prosecuted his claims against Citizens he lost, Citizens would have been entitled to reimburse itself for the defense costs, according to Citizens and the bankruptcy court. This new practice may be found to be offensive to this Court, as it flies in the face of every citizen's right to freely prosecute his adversaries without having to put up $500,000 in an escrow account. The record below demonstrate that Bishay never had an opportunity to prosecute his claims, on the merits, as Citizens disingenuously represented to the state court that Bishay's claims had been settled in the bankruptcy court, when Citizens knew that they were not. Believing Citizens' representations (as Bishay's largest creditor at that time) the state court erroneously dismissed Bishay's claims on summary judgment. The district and the appeals courts herein mistakenly, also, concluded that Bishay was looking for a second bite at the apple, where Bishay, in fact, never had his first bite.

For all such obvious reasons, and the deep pocket theory employed by Citizens to date, Bishay petitions this Honorable Court, *pro se*, after running out of financial resources otherwise required to hire counsel to file the within Petition.

Both the district and the circuit courts appear to have mistakenly concluded that Bishay already had his day in court on the merits of his claims against Citizens, the crux of which is Citizens' refusal to *release its liens even after full repayment* of Bishay's debt in 1995—and the substantial personal and corporate damages Bishay suffered as result of such egregious acts. And unless this Honorable Court steps-in an reverses this new practice, which had been already permitted by the U.S. Bankruptcy Court for the District of Massachusetts and, in essence, has been sanctioned by the district and the circuit courts, lenders will have no reason to refrain from this new practice, henceforth; and millions of secured-loan borrowers could expect to confront the same ordeal Bishay faced in 1995 in this case, which wiped out his fortune—and left him begging this Court for intervention.

Citizens described this novel experiment, which indeed was adopted by the U.S. Bankruptcy Court for the District of Massachusetts, and now sanctioned (by default) by the U.S. Appeals Court for the First Circuit, as follows (Pet. App. 14a):

> *"This issue recently arose in an unreported case in the U.S. Bankruptcy Court for the District of Massachusetts. In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay, Nos. 95-15015 and 95-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96) (available from the authors). In that case, the court addressed the lender's request to retain certain of its liens even after full debt payment pursuant to the Chapter 11 plan proposed by the lender, where the borrower had previously asserted state court lender liability claims against the lender. Under the terms of the lender's plan, the borrower would repay all outstanding principal, interest, costs and expenses currently due to the lender and, as the borrower had refused to execute a release of its claims against the lender, the lender would retain its liens in order to secure payment of any costs that the lender*

would later incur defending the borrower's lender liability claims following confirmation. The borrower, of course, objected. In confirming the plan, the court held that, under the terms of the relevant loan documents[2]*, the lender's claim included the lender's future contingent costs in connection with the debtor's state claims against the lender. As a result, in order for the plan to be fair and equitable, the lender was entitled to retain liens on the debtor's property to secure those contingent claims in an amount sufficient to cover such contingent costs (which were estimated at $500,000)"*

Both the district and the circuit courts erroneously found that Bishay was looking for a second bite of the same apple; but the record confirms that Bishay never had the first bite, respecting the merits of his claims[3].

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[2] The record below, which contains the loan documents at issue, does not include a single document, which supports the proposition made by Citizens. The record below indeed includes standard language which permits the lender to look to the borrower for its "collection costs". And Bishay always contended that such costs in fact end on the day the loan is repaid; and the lender is not entitled to appropriate, or misappropriate, the borrower's equity in his/her property, well after the debt is repaid—and practically to fund future, hypothetical collection fees after no further collection efforts are required.

[3] All of Bishay's claims asserted against Citizens, including the issue discussed herein, which was Citizens' refusal to release its liens even after full repayment, were erroneously dismissed on summary judgment by a state court judge after Citizens disingenuously represented to that court that said claims were settled in the Bankruptcy Court, when Citizen knew they were not. Bishay's claims against Citizens also included the propriety (or lack thereof) of Citizens' strained interpretation of the typical *cost of collection* clause normally found in standard loan documents, including Citizens' specific loan documents presented to the bankruptcy court, which entitled Citizens to collect such fees as part of the total amount due and owing at the time the debt is fully repaid. There was not a shred of evidence to support the strained proposition Citizens advanced, which would have obligated Bishay to pay Citizens fees or costs after the debt in question was paid in full. Bishay, therefore, challenges Citizens to

A debtor who files for Chapter 11 bankruptcy notifies his creditors and the bankruptcy court of all assets he owns, including any lawsuits he may file against his creditors. See, *e.g.*, *Oneida Motor Freight, Inc.* v. *United Jersey Bank*, 848 F.2d 414, 416 (CA3 1988). When the bankruptcy court confirms a plan of reorganization, the order of confirmation is a binding judgment that, by default, is *res judicata* with respect to claims between the debtor and the creditors. See, *e.g.*, *Katchen* v. *Landy*, 382 U.S. 323, 334 (1966). In some cases, litigating all such claims in the bankruptcy court would take years. In order to expedite the process of Chapter 11 reorganization, Congress accordingly enacted a statute permitting a debtor to reserve his/her claims for litigation after the bankruptcy plan is confirmed: "[A] plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3)(B). In this case, the creditor (Citizens Bank) itself drafted the plan's reservation clause: *"The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')."* The bankruptcy court approved the plan, including the reservation clause, and ordered the debtor (petitioner Bishay) to post $500,000 as security for costs Citizens might incur in defending against those claims. The District Court, and later the Appeals Court, nonetheless held

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show this Court, in its expected opposition to this Petition, that Citizens has any documents, which Bishay executed, that remotely suggest that Citizens was entitled to collect fees or costs after the loan at issue was repaid in full—or otherwise entitled Citizens to retain its liens on Bishay's assets, prospectively—and is precisely the reason Citizens' counsel in that case posed the question: *May a Secured Lender Refuse to Release Its Liens Even After Repayment*—because Citizens' loan documents did not afford it the right to launch such an experiment or pose this novel question, after it successfully managed to catastrophically devastate Bishay.

that Bishay was not entitled to assert a breach of contract claim against Citizens even after Bishay met his end of the bargain by putting up the additional $500,000 to do just that (prosecute his claim against Citizens), and Citizens abrogated said agreement by representing to the state court that Bishay's claims had already been settled in the bankruptcy court, when Citizens knew they were not.

1. Petitioner Bahig Bishay owned a business in East Walpole, Massachusetts that sold, leased, and serviced luxury cars. Bishay who had been an evergreen[4] customer of Neworld Bank, with good standing, over a twenty year period, in 1988 borrowed for his business $2.5 million from Neworld Bank; and from 1989 through 1994 Bishay entered into a series of agreements with Neworld regarding the timing for repaying the loan. [Record below]. Respondent Citizens Bank bought Neworld in April 1994 and immediately changed the course of dealing with Bishay and other customers and demanded full repayment of all such loans. Shortly thereafter, Bishay reduced his loan by approximately $1.0 million, and in the process of repaying the entire remaining balance of approximately $1.5 million, Bishay requested Citizens to prepare the standard lien releases respecting Bishay's $20.0 million in assets he had pledged to secure his loan. In the summer of 1995 Citizens' loan officers, however, advised Bishay that they were directed by the executives of the bank to demand a "*general release*" in addition to the full repayment. This, Citizens was not entitled to do under the loan documents. Citizens filed suit against

[4] Evergreen was a term used in the banking community during the relevant time frame, where "preferred" clients, such as Bishay, who possessed high credit rating; and placed with the lending institution more than sufficient cash or other assets to secure the credit facilities offered by the various banks at that time, including Revolving Lines of Credit, were referred to as "evergreen clients" and/or "evergreen lines of credit." This category of lines of credit were automatically renewed one year after the next, hence the definition "evergreen".

Bishay in the state court and alleged that Bishay defaulted on his obligations, knowing that Bishay had initially paid Citizens $300,000 and later paid another $700,000—leaving a balance of approximately $1.5 million, which was still secured by assets valued at more than thirteen times the loan balance (known as 13:1 LTV). Citizens also used private information it learned from Bishay to try to acquire for itself a property about which Bishay was negotiating with the FDIC. As a result of Citizens' actions, which prevented Bishay from repaying the remaining balance of his loan (after Citizens refused to prepare standard lien releases because it wanted to retain liens on Bishay's properties, indefinitely, or at least until such time Bishay executed a "general release", in addition to full repayment), Bishay's business enterprise was severely damaged. Then Citizens sued Bishay alleging he had breached his loan agreement, and in the summer of 1995 Bishay filed an answer containing a counterclaim that alleged (1) a breach by Citizens of its duty of good faith and fair dealing, and (2) unfair trade practices by Citizens under Massachusetts General Laws Chapter 93A. [Record below]. Due to Citizens' repeated threats to foreclose on Bishay's more than $20.0 million in assets, and auction them off because Bishay refused to execute the general release Citizens demanded, Bishay sought Chapter 11 bankruptcy protection to stop Citizens' unjustified aggression.

Although Bishay was willing and able to pay his creditors—and indeed repaid *every* creditor *in full* in 1996—he was compelled to file for Chapter 11 bankruptcy to protect himself against the actions of Citizens that were preventing him from running his business. [Record below]. Bishay again attempted to pay Citizens in full, but Citizens refused to release its liens even after full repayment, demanding that Bishay also release all of his claims against Citizens before Citizens would release its liens on Bishay's properties. Bishay refused the demand for a general release, in addition to the full repayment, and in October 1995 Bishay gave

Citizens a list of additional claims that he intended to pursue against the bank and notified Citizens that he would amend his previously filed counterclaims to include the additional claims. The amending of Bishay's list of claims against Citizens was approved by both the state and the bankruptcy courts in 1996. [Record below].

Citizens filed a third-party plan of reorganization in the Bishay Chapter 11 proceeding. [Record below]. This plan initially sought to extinguish Bishay's claims against the bank by providing that Citizens would pay Bishay $10 (Ten Dollars) in return for the release of "all claims." The Chapter 11 Trustee informed Citizens of his intention to oppose the plan on the ground that its failure to preserve those litigation rights made the plan unconfirmable. In response, Citizens modified its proposed plan by replacing the claim-extinguishing clause with the claim-preserving clause, which is heart of this case: *"The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')."* On July 31, 1996, the bankruptcy court issued an order appointing Bishay as the *"authorized representative"* of his estate. [Record below]

Neither the plan of reorganization nor the order of confirmation determined the extent to which Bishay's debt to Citizens was enforceable. To the contrary, the plan—which, as noted, Citizens itself had drafted—required Bishay to pay the debt to Citizens only "until and unless" those obligations were reduced by an offsetting judgment obtained by Bishay against Citizens in the pending state court litigation. The plan accordingly characterized Citizens' claims against Bishay as "impaired," whereas it characterized the claims of all other creditors as "unimpaired." Citizens further acknowledged Bishay's preserved claims by demanding that the bankruptcy court require Bishay to post the extraordinary sum of

$500,000 as security for the costs Citizens might incur in defending itself against those claims—which is the subject of the propriety (or lack thereof) of any liens or cash security that must be placed in escrow in order to permit a borrower to freely assert his/her claims against his/her lender? In its request, Citizens referred, specifically, to Bishay's itemized list of claims and described the claims as "wide-ranging." Citizens also acknowledged these claims, and petitioner's retention of them, in its Disclosure Statement. [Record below]

The bankruptcy court approved Citizens' proposed plan on April 23, 1996. [Record below]. The confirmed plan reserved Bishay's right to "prosecute [his] alleged claims against Citizens" on the condition that Bishay post the $500,000 as security for Citizens' defense of those claims. Bishay complied with the order by posting the $500,000.

2. In June 1996, Citizens filed a motion in Massachusetts Superior Court for summary judgment with respect to Bishay's two-count counterclaim; and Bishay moved to amend his answer and counterclaim. The court granted Bishay's request, and it denied Citizens' motion "without prejudice to renew it as to the amended answer and counterclaim." [Record below] Bishay accordingly amended his counterclaim to include six counts, all of which were on the list that he had sent Citizens in October 1995: the two original counts, along with promissory estoppel, intentional interference with contractual and advantageous relations, request for declaratory relief with respect to the validity of a Forbearance Agreement, and intentional infliction of emotional distress.

Citizens then moved for summary judgment with respect to the four counterclaims that had not been contained in Bishay's original answer, arguing that those counterclaims were barred by the doctrine of *res judicata*; and that said claims were already settled in the bankruptcy court, which Citizens knew they were not. [Record below]. Bishay responded that the plan expressly reserved his claims and

ordered him to pay Citizens only "unless and until" Bishay obtained a favorable judgment against Citizens in the state court litigation.

The Superior Court rejected Bishay's argument and adopted Citizens', notwithstanding that Citizens knew that its representations were false. The state court wrote the following:

> *"[C]citizens first contends that it is entitled to judgment as a matter of law on the ground that most of Bishay's counterclaims are precluded by the Bankruptcy Court's April 23, 1996 Confirmation Order. The doctrine of prior adjudication has two aspects. Res judicata, or claim preclusion, dictates that a valid and final judgment rendered by a court of competent jurisdiction bars relitigation between the same parties of any claim that was or might have been raised with respect to the subject matter of the prior litigation . . ."* [Record below].

3. After an unsuccessful appeal Bishay filed with Massachusetts Appeals Court, in 1999 Bishay filed a "breach of contract" action (not asserted in the earlier state court case) with the US District Court, District of Massachusetts. The crux of Bishay's new cause of action is that based on the specific agreement confirmed by the bankruptcy court, which required Bishay, on one hand, to put up $500,000 in order to freely prosecute his claims against Citizens (with no limitation on what was asserted prior to the bankruptcy, and what was later added during the bankruptcy). Having put up the additional $500,000 in cash in order to freely prosecute his claims against Citizens, Bishay argued that he was entitled to a finding by the district court that Citizens breached the agreement with him, which had been approved by the bankruptcy court. Bishay also argued that the actual breach was completed and became actionable once Citizens drew against $500,000 in 1999, which Bishay had placed in escrow so that he would freely prosecute all of his claims as agreed-

to by Citizens. In other words, Citizens' breach foreclosed Bishay from enjoying the fruits of the contract at issue, albeit unfair on its face, as no one should be ordered by any court to put up $500,000 in order to be granted the right to assert a legitimate claim against his/her lender.

REASONS FOR GRANTING THE WRIT

If this case-law now at bar endures, Citizens and other secured-lenders will, if they have not already, refuse to release their liens even after full repayment. This would, if it has not already, create tremendous imbalance between borrowers and lenders and, essentially, would foreclose borrowers from being able to freely refinance or sell their respective properties[5].

To avoid manifested injustice for multitudes of secured-loan borrowers for years to come, this Honorable Court must (1) settle the issue raised by Citizens, and that is: *May a Secured Lender Refuse to Release Its Liens Even After Repayment?;* and (2) reverse the judgment issued by the US Court of Appeals for the First Circuit, and allow Bishay, once and for all, to prosecute his rightful claims against Citizens.

This new practice, now the case-law at bar, and if it endures, arguably, would: (1) foreclose multitudes of secured-loan borrowers from asserting claims against their respective lenders in cases of fraud on the part of the lender; (2) allow a lender to leverage this new power to extort a general release to which the lender is otherwise not entitled, as demonstrated in the case at bar; (3) permit secured-lenders to charge their borrowers unconscionable interest rates, fees or other charges, for example, knowing that the borrower would not be permitted to challenge such acts because the lender con-

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[5] Real properties must first be made free and clear in order to pledge the same to a new lender, often based on more favorable terms or rates; or sold and conveyed to a new owner.

trols the equity in the respective property, as Citizens demonstrated in the case at bar; and (4) subject borrowers to face the only ultimatums: (i) to give up their constitutional right to *due process* (Fifth Amendment) and become restrained from suing the lender, or (ii) lose the equity in the respective property to the lender so the lender, Citizens in the case at bar, would appropriate such equity to fund its future defense cost, even after full repayment of the loan, as manifested herein. The most fundamental question upon which this Court must cogitate is whether such new practice should endure under any theory, scenario or circumstance—and whether a borrower should be held besieged by his/her lender or be forced to execute a general release not required by the respective loan agreement—in addition to the full repayment of the respective debt?

The below courts violated 11 U.S.C. 1123(b)(3)(B) (by default) by adopting a *per se* rule against enforcing any clause, in a Chapter 11 plan, that reserves all of a debtor's claims against a particular creditor. The decision below (by default) not only reads Section 1123(b)(3)(B) out of the Bankruptcy Code but also reads the reservation clause out of the confirmed plan. In this case, the rule worked a particularly manifest injustice because the creditor itself had drafted the clause and was acutely aware of Bishay's intention to pursue claims he had not yet filed but made abundantly known to the lender. Moreover, the rule destroys the purpose for which Section 1123(b)(3)(B) was enacted, because it forces debtors to prolong federal bankruptcy proceedings—sometimes for years—while all claims are litigated before the bankruptcy court. The decision of the below courts, in essence, sanctions the lender's herein, Citizens, new policy, which has already, and erroneously, been adopted by the bankruptcy court more than ten years ago, and is expected

to have been followed by multitudes of other ruthless lenders, if not Citizens itself during this period.

I. Certiorari is warranted because Citizens reported that there is a genuine split in federal and state courts insofar as the propriety (or lack thereof) of a lien retention well after the debt is repaid.

II. A favorable resolution by this Court would put to rest further debates and speculations introduced by secured-lenders in state and federal courts, and would spare multitudes of borrowers from losing control of their real property and related equity.

First, the decision below contradicts the express command of Congress that "a plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3).

Second, the below courts violated a core principle of contract interpretation. "Because a [bankruptcy] plan is often more akin to a contract than a disputed order, general contract principles ought to be applied to its interpretation." *UNR Indus., Inc.* v. *Bloomington Factory Workers*, 173 B.R. 149, 157 (Bankr. N.D. Ill. 1994); see also *Cohen*, 279 B.R. at 160; *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 592 (D. Del. 2002). This Court has recognized the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The below courts violated this rule by dismissing Bishay's contract claim, which Bishay timely filed (for the first time) in the district court.

Third, the below courts violated "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62. Bishay's reservation clause is clear and unambiguous; but even if it were not, its ambig-

uities should be resolved against the drafter—Citizens. In *Peltz*, the court enforced such a clause because, *inter alia*, "[p]rior to a plan's confirmation, creditors have the opportunity to examine the terms of the proposed plan and respond accordingly." 280 B.R. at 592. In *Bishay*, the argument for giving effect to the clause is even stronger because Citizens actually drafted it.

The dismissal of Bishay's contract claim is all the more difficult to justify in light of the fact that Citizens itself viewed the clause as preserving all of Bishay's claims. Citizens left the clause out of the plan it proposed initially, but "the Chapter 11 Trustee [would] not support [that] plan because * * * he believe[d] it's unconfirmable due to the treatment of Bishay's claims against Citizens (i.e. they are extinguished)." Memo of R.M. Barry to Citizens Bank of 3/13/96. [Record below]. Fearing that if "the Trustee oppose[d] Citizens' plan, it might be difficult for the judge to confirm the plan," Citizens concluded that it "shouldn't jeopardize confirmation of our plan over the settlement of Bishay's claims." [Record below]. Citizens thus understood perfectly that the modified plan it submitted would leave the bank "defending against Bishay's claims." [Record below]. Citizens acknowledged in its Disclosure Statement that those claims included the ones on the comprehensive itemized list that Bishay had given Citizens in October 1995. Indeed, the bankruptcy court ordered Bishay to post $500,000 as security for costs Citizens might incur in defending against Bishay's claims.[6] Citizens included the reservation clause as part of the typical strategic decisionmaking or bargained-for exchange that is characteristic of contract formation. The U.S.

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[6] Based on Citizens' representation that Bishay's claims had been settled in the bankruptcy court, when Citizens knew they were not, the state court inexplicably awarded $430,000 out of the $500,000 to Citizens while prohibiting Bishay from bringing the very claims for which the money was earmarked as a defense fund.

Appeals Court unjustifiably interfered with that process to protect a party that needed no protection—the creditor/drafter.

In this case, Citizens knew precisely which claims Bishay intended to make, because Bishay had notified it of those very claims in his letter of October 1995 (containing the itemized list of claims). Citizens convinced the bankruptcy court to order Bishay to set aside $500,000 for Citizens' legal fees in defending those claims. Citizens thus knew, at the time the bankruptcy plan was confirmed, precisely the litigation prospects it faced. This set of circumstances occurs often in cases involving general reservation clauses: The creditor understands the scope of the claims it faces because it is intimately familiar with the details of its own conduct (or misconduct).

Finally, there is no merit in the below courts suggestion that the four counts Bishay added to his counterclaim after confirmation were necessarily adjudicated by the bankruptcy court's order. The bankruptcy court provided precisely the opposite. The plan that the bankruptcy court confirmed characterized Citizens' claims against Bishay as "impaired" by Bishay's reserved claims and decreed that Bishay had to pay Citizens only "until and unless" his obligations were reduced by an offsetting judgment against Citizens in the pending state court litigation. Even the Massachusetts Superior Court acknowledged that the bankruptcy court had issued an order appointing Bishay as representative of the debtor's estate so as to permit him to "pursue the present litigation." Neither Citizens nor the courts below can offer any explanation why the bankruptcy court would order Bishay to set aside $500,000 for Citizens' defense costs if that court believed the bank would have to defend only the two pre-confirmation counts of

Bishay's counterclaim—something that would run no more than fifty thousand dollars; and not Half a Million Dollars[7].

The issues presented here are vital to the economical welfare of every borrower, debtor, and the administration of the bankruptcy system at large. "Obviously, if it is necessary to identify completely and disclose the intent with regard to each avoidance action in order to preserve it properly, then the Bankruptcy Code's goal of a quick and orderly confirmation may be substantially derailed." Vines & Teofan, 12 Bankr. Dev. J. at 761. The reason is that "the confirmation process is expedited by allowing debtors to include a general reservation of their right to pursue certain causes of action at a later date." *Cohen*, 279 B.R. at 159; see also *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997). The federal bankruptcy court in *Cohen* gave a detailed explanation of the problem:

> [I]n large chapter 11 cases, the investigation and litigation of all possible avoidance actions to final judgment can take years. To force the debtor to remain in bankruptcy until a final determination of all possible preference actions is made would act as a detriment to both the debtor and its creditors by slowing down the reorganization process. In most of the large Chapter 11 cases in this Court, the plan of reorganization and/or liquidation is often confirmed before the debtor and/or a trustee has undertaken a detailed investigation of the potential preference actions. In large Chapter 11 cases there may be hundreds or even thousands of transaction[s] within the 90-day period and considerable time and effort is needed to examine those transactions in light of the numerous defenses provided for in § 547(c). More often than not, it is appropriate to delay that undertaking until after plan confirmation.

279 B.R. at 159; see also *Peltz*, 280 B.R. at 591.

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[7] Excluding the additional fees and costs Bishay incurred with his own attorneys.

"[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action." *Acequia, Inc.* v. *Clinton*, 34 F.3d 800, 808 (CA9 1994)). "Clearly, it is not always possible to complete an investigation of a potential preference action prior to what might otherwise be the appropriate time to seek confirmation." Vines & Teofan, 12 Bankr. Dev. J. at 761. As in ordinary civil litigation, a party to a bankruptcy proceeding may not be able to learn of all potential claims until the process of discovery has begun. Prohibiting debtors from reserving all claims thus creates the injustice of extinguishing claims the debtor *could not* have identified specifically at the time the plan was confirmed.

For this reason, parties to a bankruptcy proceeding cannot use clever drafting to escape the problem created by the lower courts *per se* rule. Even a debtor aware of the rule would know that he/she might well be unable to identify, before completing an investigation, every claim he/she possesses against a creditor. As a result, the debtor's only recourse is to litigate and investigate all claims fully before the bankruptcy court confirms the plan. This is precisely the outcome that Congress enacted Section 1123(b)(3)(B) to avoid.

The below decisions thus impose a hefty burden upon the federal bankruptcy courts. In *every* Chapter 11 case, the debtor will potentially have claims he could pursue against a creditor. The *per se* rule adopted in *Bishay* forces all such debtors to drag out the bankruptcy proceedings—delaying the date that creditors are repaid, that the reorganized debtor can start anew, and that the bankruptcy court can move on to other cases—while they investigate as many potential claims as they can manage to foresee.

Certiorari is accordingly warranted in order to: (a) put to rest the conflict reported by the lender herein; and (b) allow Bishay to prosecute his long-awaited claims so that the prac-

tice of *refusing to release a lien even after repayment* would endure no more, and the proper signal would reach every secured lender doing business in the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 19, 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1364

BAHIG F. BISHAY,
Plaintiff, Appellant,

v.

CITIZENS BANK OF MASSACHUSETTS,
Defendant, Appellee.

Entered: January 19, 2007

JUDGMENT

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Richard Cushing Donovan
RICHARD CUSHING DONOVAN, Clerk

[cc: Mr. Bishay, Mr. Stroll, Mr. Ryan, & Ms. Busny.]

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1364

BAHIG F. BISHAY,
Plaintiff, Appellant,

v.

CITIZENS BANK OF MASSACHUSETTS,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, *U.S. District Judge*]

BEFORE

Boudin, *Chief Judge*,

Torruella and Howard, *Circuit Judges*.

Bahig F. Bishay on brief pro se.

Elise Busny, James W. Stoll and *Brown Rudnick Berlack Israels LLP* on brief for appellee.

January 19, 2007

Per Curiam. We affirm the judgment of dismissal substantially for the reasons recited in the district court's memorandum and order, *see* 2005 WL 2514929 (D. Mass. 2005), adding only the following comments.

To recover an unpaid loan, appellee Citizens Bank of Massachusetts ("Citizens") brought a state court action in 1995 against appellant Bishay and a company he owned (collectively "Bishay"). Bishay filed two counterclaims and later applied for bankruptcy protection. The ensuing reorganization plan contained a reservation clause, which permitted Bishay to pursue his counterclaims on condition that he procure a letter of credit ("LOC") to compensate Citizens for its expenses if it prevailed in state court. Bishay did so and then added four new counterclaims in an amended filing. At the summary judgment stage, the superior court concluded that the four new claims were not covered by the reservation clause and were subject to dismissal on preclusion grounds. The court rejected the original two claims on other grounds and later awarded attorney's fees to Citizens. When Bishay refused to make payment, Citizens collected its fees award in 1999 by drawing on the LOC. The state appeals court subsequently affirmed. *See* 56 Mass. App. Ct. 1104 (2002).

Bishay filed the instant action in 2005. In six counts, he charged that Citizens' draw on the LOC violated the reorganization plan and was actionable on various grounds including breach of contract. But his underlying allegations mirrored those he had earlier advanced in state court. For example, the LOC draw was supposedly unlawful (or at least premature) because the reservation clause had been misinterpreted and he had been wrongfully denied the opportunity to pursue his four new counterclaims. The district court deemed the complaint "an improper collateral attack" on the state court judgment and concluded that "Bishay's recasting of his dissatisfaction with the adverse rulings of [the state] courts into a breach of contract claim . . . does not alter the fact of preclusion." We agree.

The precise nature of Bishay's breach of contract claim—the only claim he has pursued on appeal—is unclear. At times, he appears to be raising a procedural objection: that

disposition of his counterclaims at the summary judgment stage was improper because the reservation clause entitled him to prosecute his claims through trial. At other times, he appears to be raising a more substantive objection: that the reservation clause barred Citizens from relying on a preclusion defense, regardless of the procedural mechanism chosen to do so. Yet this ambiguity need not be resolved, since both of these arguments involve the scope of the reservation clause. That issue has already been decided in state court, whose rulings are entitled to full faith and credit. Bishay cannot now relitigate the matter in federal court. *See generally McDonough* v. *City of Quincy*, 452 F.3d 8, 16 (1st Cir. 2006) (applying Massachusetts law of claim preclusion); *Johnson* v. *Mahoney*, 424 F.3d 83, 93 (1st Cir. 2005) (applying Massachusetts law of issue preclusion).

Bishay argues that his contract claim is not subject to preclusion because it did not exist in 1996 when he filed his amended counterclaims in state court. But his attempt to lump all such claims together for purposes of preclusion analysis is misplaced. The superior court found the counterclaims to be precluded by the bankruptcy court ruling. *See, e.g., In re Belmont Realty Corp.*, 11 F.3d 1092, 1095 (1st Cir. 1993) (noting that "normal rules of res judicata apply to decisions of bankruptcy courts"). By contrast, the district court found the contract claim to be precluded by the state court judgment. That the contract claim may not have existed in 1996 had no bearing on the district court's analysis.

Bishay also asserts that Citizens "opened the door" to his bringing the contract claim when it drew on the LOC in 1999. Yet his objections to the LOC draw, rather than advancing any new basis for relief, simply reproduce the arguments earlier resolved by the state court regarding the scope of the reservation clause. The district court properly rejected this attempt to get a second bite of the apple.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 05-10451-RGS

BAHIG F. BISHAY,

v.

CITIZENS BANK OF MASSACHUSETTS.

October 11, 2005

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

STEARNS, *D.J.*

On March 10, 2005, Bahig Bishay brought this Complaint against Citizens Bank of Massachusetts (Citizens) alleging breach of the covenant of good faith and fair dealing, breach of contract, fraud, breach of fiduciary duty, unjust enrichment, and a violation of Chapter 93A (Counts I to VI, respectively). On April 7, 2005, Citizens moved to dismiss Bishay's lawsuit, arguing successively that the court lacks subject matter jurisdiction, that the Complaint is an improper collateral attack on a final judgment, that the Complaint is barred by the applicable statutes of limitations, and that it fails to state claims upon which relief can be granted.

This lawsuit is the latest chapter in a decade-old dispute. According to the Complaint, Bishay had been a long-time client of Neworld Bank and its predecessor Charlestown Savings Bank. In 1994, Citizens acquired Neworld and declared Bishay in default on an outstanding $2.5 million loan. Bishay paid the loan down to $1.5 million, but in June

of 1995 Citizens sued Bishay in Norfolk Superior Court for the unpaid balance. Bishay responded by bringing a counterclaim against Citizens alleging various types of lender misconduct.

On July 25, 1995, Bishay caused an entity he owned, 1095 Commonwealth Avenue Corporation, to file for Chapter 11 bankruptcy.[1] On April 23, 1996, the Bankruptcy Court confirmed a Plan of Reorganization (the Plan). The Plan subsumed Bishay's outstanding debt to Citizens, but by a reservation of rights permitted Bishay to pursue his lender liability claims in the state court on condition that he either post a $500,000 letter of credit (LOC) or grant Citizens a $500,000 lien on one of his properties.[2]

Bishay elected to post the LOC. Citizens then filed two consecutive motions for summary judgment, arguing that Bishay's counterclaim was either barred by res judicata or had been released under the terms of a 1994 Forbearance Agreement. In December of 1997, and in February of 1998, the Norfolk Superior Court ruled in Citizens' favor. Bishay then repaired to the Bankruptcy Court where he filed a "Motion to Clarify and Amend the Reservation Clause in the April 23, 1996 Confirmed Plan of Reorganization, Nunc Pro Tunc, and to Declare that the Alleged Claims of the Debtor are Non-Core." Bishay argued that intervention of the Bankruptcy Court was necessary to correct "the misunderstanding of the Norfolk Superior Court as to matters ex-

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[1] Bishay filed a petition for personal bankruptcy in September of 1995, which was consolidated with the 1095 Commonwealth Avenue Corporation petition.

[2] The reservation clause stated in relevant part:

> [t]he debtors' estates may retain, and by its duly authorized agent representatives settle, release, or prosecute, their alleged claims against Citizens' arising from the transactions between the Debtor and Citizens and related matters . . . .

pressly reserved by the Bankruptcy Court for adjudication in the Norfolk Superior Court." The Bankruptcy Court rejected Bishay's plea and Bishay appealed to the Bankruptcy Appellate Panel (BAP). *See In re 1095 Commonwealth Avenue Corp.*, BAP No. MB 98-051 *1 (1st Cir. July 14, 1999). The BAP rejected Bishay's appeal holding that his motion for clarification was in reality an untimely motion to modify the confirmation of the Plan.

> In Bishay's case, the issues relating to plan interpretation of the scope of Bishay's reservation of claims and release could have been litigated in either the bankruptcy court or the state court. Bahig Bishay and 1095 Commonwealth Avenue Corp. took their chances with the state court and cannot now re-litigate the same issues here. The state court judgment entered against Bishay is entitled to full faith and credit.

Id. at *3.

In October of 1998, the Superior Court granted Citizens' third motion for summary judgment and dismissed Bishay's six-count counterclaim in its entirety. In addition to ruling in Citizens' favor on the merits, the Court awarded Citizens $360,000.00 in attorneys' fees. When Bishay failed to pay the fee award, Citizens reimbursed itself from the LOC. Bishay then appealed the summary judgment decisions to the Massachusetts Appeals Court. That Court affirmed the Superior Court rulings. *Citizens Bank of Massachusetts v. Bishay*, 56 Mass. App. Ct. 1104 (2002). Applications for further appellate review were denied by the Supreme Judicial Court and the United States Supreme Court.

Two years later, Bishay filed this Complaint *pro se* asserting, among other claims, a breach of contract. Bishay alleges that Citizens breached the April 23, 1996 Plan of Reorganization by drawing down on the LOC before his

counterclaim had been fully adjudicated on the merits.[3] Bishay contends that he was:

> entitled . . . to prosecute his Claims, so long as Bishay placed $500,000 in escrow. Citizens, on the other hand, and despite Bishay's compliance with his end of the bargain, deprived Bishay from the fruits of his bargain, as it led the state court to believe that Bishay's Claims were (a) extinguished in the Bankruptcy Court; (b) Bishay allegedly released said Claims in the Bankruptcy Court; and (c) Citizens was entitled to summary judgment, by disingenuously invoking the doctrine of res judicata, as if Bishay's Claims had already been tried and lost, which Citizens knew never happened.

Complaint, ¶ 15. At the crux of Bishay's contract claim is his belief that under the terms of the Plan he was entitled to a trial on the merits of his counterclaims, an entitlement that he lost when Citizens filed its underhanded and misleading summary judgment motions. Bishay maintains that under his "contract" with Citizens, he

> was entitled to freely prosecute his Claims after he placed $500,000 in escrow, and that if after he prosecuted the subject Claims he lost, Bishay was required to then reimburse Citizens for its out pocket costs in defending the subject Claims after the trial (an opportunity Bishay never had in any court, hence the "breach").

Complaint, ¶ 14.[4]

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[3] The argument rests on the somewhat dubious proposition that the Plan of Reorganization was a contract to which Citizens was a party.

[4] Bishay contends that "the United States Bankruptcy Court indeed authorized Bishay to proceed with the prosecution of the subject claims. . . . It defies commonsense to now hear Citizens argue that it did not guarantee Bishay an opportunity to fully prosecute his claims. Bishay stated in his Verified Claim, Webster's New World Dictionary defines the meaning of the term

Citizens argues inter alia that Bishay's Complaint constitutes an improper collateral attack on a final judgment. Bishay maintains that his present claims are separate and distinct from his Superior Court counterclaims because they are based on Citizens' breach of the Plan and the reservation of rights clause and not on the substantive merits of the counterclaims themselves. Bishay's arguments are unpersuasive on a number grounds. First, even if the Plan could be considered a contract in some fashion binding Citizens, there was nothing in the reservation of rights that waived Citizens' right to mount a summary judgment defense and proceed instead to a trial on the merits. Citizens had the same right as Bishay to fully deploy its defenses including all proper procedural means permitted by statute and rule. A grant of summary judgment, contrary to Bishay's understanding, is a judgment on the merits. Nor did Citizens grant itself summary judgment or award itself attorney's fees. Those decisions were the office of the Superior Court. And as the Bankruptcy Court held, the Superior Court's rulings are entitled to full faith and credit.[5] *See Wright Machine Corp. v. Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974) (considerations of fairness and judicial economy dictate that there be an end to litigation and that those who have contested an issue be bound by the results). *See also Cellotex Corp. v. Edward*, 514 U.S. 300, 313 (1995). Bishay unsuccessfully appealed the Superior Court's dismissal of his counterclaims in every conceivable (and some not so available) fora. Bishay's recasting of his dissatisfaction with the adverse rulings of these courts into a breach of contract claim against Citizens

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'PROSECUTE' as follows: '1 *to follow up or pursue (something) to a conclusion.*'" Plaintiff's Memorandum, at 11.

[5] The Full Faith and Credit Clause commands federal courts to give preclusive effect to the adjudications of sovereign state courts. *See University of Tennessee v. Elliott*, 478 U.S. 788, 798-799 (1986).

does not alter the fact of preclusion. Consequently, the motion to dismiss will be *ALLOWED*.

ORDER

For the foregoing reasons, Citizens' motion to dismiss is ALLOWED with prejudice.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

THE BANKRUPTCY STRATEGIST

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An Unsettled Area

May a Secured Lender Refuse to Release Its Liens Even After Repayment?

By William R. Baldiga and Kelly A. McEnaney

IF A LENDER and a borrower enter into a loan agreement that includes a grant of a mortgage or security interest to the lender, when must the lender release its liens? Common sense suggests that a lender need not terminate its liens until the borrower has fully performed its obligations to the lender, but what if the borrower repays principal, interest, costs and expenses, but still owes contingent obligations to the lender?

This article addresses what happens when a borrower fully repays its loans, but the lender may incur further collection expenses due to actions that the borrower has brought or threatened to bring against the lender based on the lending relationship. We conclude that, under certain circumstances, although a borrower has repaid its presently outstanding obligations, a lender can (and perhaps should) refuse to release its liens unless it receives assurances that it will not incur collection costs.

The Problem

Whether a lender must release its liens generally becomes an issue only if the borrower requests a termination statement or a mortgage discharge. The Uniform Commercial Code provides that "whenever there is no outstanding secured obligation and no commitment to...incur obligations...the secured party must on written demand by the debtor send the debtor...a termination statement to the effect that [the secured party] no longer claims a security interest under the financing statement...." *See, e.g.*, Mass. Gen. L. ch. 106, §9-404 (1997); N.Y. UCC §9-404 (McKinney 1997).

Similarly, a lender must discharge a mortgage upon request by the borrower, but only if the borrower has fully performed the terms of the mortgage. *See, e.g.*, Mass. Gen. L. ch. 183, § 55; N.Y. Real Prop. Acts. Law § 1921 (McKinney 1997). However, neither the UCC nor state real property law clearly defines when a borrower's obligations have been fully performed or paid.

A borrower's obligations usually will be defined to include payment of the lender's collection costs, including attorney fees. Most courts have held that charges incurred by a lender in defending claims that are directly related to the lending relationship or that interfere with the secured creditor's ability to collect the debt constitute recoverable costs of collection. *See, e.g., In re Auto Specialties Manufacturing Co.*, 18 F.3d 358, 361 (6th Cir. 1994); *Duryea v. Third Northwestern National Bank of Minneapolis*, 606 F.2d 823, 826 (8th Cir. 1979). As a result, if a lender incurs attorney fees defending claims brought by a borrower in an attempt to avoid paying the loan before the loan balance is repaid, such fees would be existing secured obligations that the borrower would have to pay before the lender releases its liens.

But what happens when the borrower's lawsuit has been asserted or threatened, but the lender has yet to incur expenses? At first it appears that the lender is placed in a no-win situation. If the lender discharges its liens, it leaves itself unprotected in the event it later incurs collection costs. But if the lender refuses to terminate the liens and that refusal is unjustified, the lender could be liable to the borrower for damages. *See, e.g.*, Mass. Gen. L. ch. 106, §9-404 (1997); N.Y. Real Prop. Acts. Law § 1921 (McKinney 1997). However, there is a solution to this dilemma.

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May a Secured Lender Refuse to Release Its Liens

Continued from Page 1

Must a lender terminate its liens in that situation? The present case law in this area is not very helpful. There are no cases that directly address whether the possibility that a lender could incur defensive costs that would be recoverable from the borrower constitutes an outstanding obligation secured by existing liens, and the few cases that touch on the issue are inconsistent.

In one case, the U.S. Court of Appeals for the Eighth Circuit was confronted with a situation where a lender claimed that, although its entire principal balance had been repaid, it retained a lien that secured attorney fees that it subsequently incurred defending an action brought by a third party. *In re Apollo Travel Inc.*, 567 F.2d 841, 842 (8th Cir. 1977). In holding that the lender did not have a secured claim in the borrower's later bankruptcy case, the Eighth Circuit focused on the fact that the lender had admitted in its complaint that it considered the borrower's indebtedness as substantially repaid in full prior to the bankruptcy date. Ultimately, the court held that "secondary, contingent liabilities were not secured after the loans were repaid and bankruptcy intervened before any actual indebtedness arose." *Id.* at 845.

However, in reaching its decision, the court noted that it was questionable whether the borrower ultimately would have been liable for the attorney fees in question. Also, the court stated that it was expressing no opinion as to whether the lender would have had a secured claim if the third-party cause of action had been meritorious or if the claims had been asserted by the borrower, as opposed to a third party.

Another case that touches on the issue is from the Second Circuit, *Dick Warner Cargo Handling Corp. v. Aetna Business Credit Inc.*, 746 F.2d 126 (2nd Cir. 1984). In that case, one of the borrower's other creditors obtained a judgment lien against the borrower. The judgment creditor attempted to enforce its lien against funds that the lender held in a lockbox and in which the lender claimed an interest. The judgment creditor argued that the lender did not have an interest in the lockbox funds because the borrower had previously repaid all outstanding advances. The lender argued that, although the borrower had repaid all advances, the lender retained an interest in the funds to secure obligations of the borrower that might later accrue.

The Second Circuit agreed with the lender, holding that the debtor's obligations to pay interest and to indemnify the lender for various expenses incurred by the lender,

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Even After Repayment?

including attorney fees for defending claims, were obligations for "non-advances," and that the secured creditor's interest with respect to "non-advances" was perfected at the time that the lender initially perfected its interest in the borrower's property. As a result, because the original obligation to make loan advances was undertaken before the judgment lien attached, the lender had a lien securing payment of legal fees that had priority over the judgment creditor even though the legal fees had yet to be incurred. In other words, the lender's lien securing payment of its attorney fees survived the full payment of all outstanding monetary obligations.

In order to reach that decision, the court implicitly found that, notwithstanding the borrower's repayment of all outstanding sums due, there were still outstanding secured obligations owed by the borrower. As a result, this case supports the conclusion that a lender retains a perfected security interest to the extent that there is a possibility that it could incur costs or expenses that are payable by the borrower and that would be secured under the terms of the parties' agreements. While the Second Circuit never directly addressed whether the lender would have had to provide a termination statement after the borrower repaid its outstanding monetary obligations, the case's reasoning would support denial of such a release unless the borrower provided the lender with assurances that it would not incur further "non-advance" obligations.

The Solution

So where does all of this leave a prudent lender? That answer may depend in part on whether the borrower has passed the stage of making threats. If the borrower has actually asserted claims against the lender in a judicial proceeding, either as affirmative claims or counterclaims to an action by the lender to collect the debt, the lender is in a stronger position to assert that, notwithstanding "full" payment, the borrower is not entitled to a discharge. Even if the borrower makes "full" payment, unless it tenders a release of claims to the borrower, the lender likely will incur additional fees that the borrower is obligated to pay and that should be secured. However, if the borrower has only made threats to sue, the lender's position is weaker. In that situation, it is less likely that the lender will actually incur recoverable expenses.

How to Protect Yourself

So, what should a lender do to protect itself from being stuck with huge defensive costs and no collateral from which to recover those costs when it prevails? The first and most obvious strategy is to draft the loan documents with this contingency in mind. Loan agreements should clearly provide that a borrower's obligations include payment of defensive costs, and that the lender's liens shall secure payment of those costs and shall continue in full force and effect until there is no possibility that the lender will incur such costs. In other words, draft your lender documents to permit you to retain your liens until you are paid in full and get a general release.

However, what if someone else drafted the loan documents and they do not adequately address this issue? The lender should focus on this risk when a borrower requests a payoff letter from the lender. In the payoff letter, the lender should condition the release of its liens on receiving a release from the borrower of any claims that the borrower might have against the lender. By placing this condition in the payoff letter, the lender signals that it considers the possibility that it will incur defensive costs one of the obligations secured by its liens. As a result, the borrower cannot later claim that the lender agreed that all obligations had been paid in full.

Should Lender Refuse To Terminate Its Liens?

If the borrower refuses to provide a release, should the lender refuse to terminate its liens? As discussed above, if the lender improperly refuses to provide the requested discharge or termination statement, the borrower may have a claim for damages. However, if the lender releases its collateral and subsequently incurs defensive costs, it may never recoup those costs. So any decision presents a risk. In evaluating the risk, lenders should consider:

(i) the adequacy of the language in the parties' loan documents to recover defensive costs;

(ii) the likelihood that the borrower will actually assert claims; and

(iii) the nature of the claims that are expected to be asserted.

If the borrower has actually asserted claims or made a credible threat, the lender should consider refusing to terminate its liens unless it receives a release from the borrower. If the borrower has not asserted claims, but the lender thinks it might later do so, the lender should try to force the borrower now either to assert or waive those claims while the lender still holds its liens.

With this in mind, a lender should strongly consider instituting an action for a declaratory judgment that its liens continue as long as the potential for incurring defensive costs exists. This would allow a lender to avoid exposure for improperly refusing to terminate its liens. However, institution of such an action could be expensive, and it is not clear that such expenses would be reimbursable.

Refusing to terminate liens without a release of liability can provide a lender with additional leverage when

Continued on Page 4

Consider Seeking Relief

Court Wrestles With Extension of Stay to Non-Debtor

By Jeff J. Friedman

CREDITORS with a claim against a non-debtor third party who is liable with the debtor on the claim should be aware of a recent Third Circuit decision, *McCartney v. Integra National Bank North*, 106 F.3d 506 (3d Cir. 1997). *McCartney* held that the automatic stay applied to prohibit a guarantee creditor of the debtor from judicially determining the amount of its deficiency claim against the non-debtor primary obligor. The decision, while analyzing the issues in terms of extending the automatic stay, found that the stay was applicable without a request from the debtor for an injunction pursuant to, for example, Sec. 105(a) of the Bankruptcy Code.

In *McCartney*, the bank loaned $80,000 to Lamar's Restaurant & Lounge Inc., secured by a first mortgage on Lamar's property. The loan to Lamar's was guaranteed by McCartney and by the Small Business Administration (SBA). McCartney's guarantee was secured by a second mortgage on property owned by McCartney.

McCartney filed a Chapter 13 petition in May 1992 and moved to sell non-debtor Lamar's property on which the bank had its first mortgage. The bank, SBA and McCartney agreed at the property sale hearing that the bank, acting with the SBA, would put the property through a sheriff's sale to determine what deficiency, if any, McCartney owed under his guarantee.

The bank filed a protective proof of claim in McCartney's case in the amount of $38,564.66 in advance of the sheriff's sale. The bank purchased the property at the sale for costs and unpaid taxes and thereafter resold the property. The bank voluntarily reduced its proof of claim to $29,638.14, plus interest and attorney

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May Lender Refuse to Release Liens After Repayment?

Continued from Page 3

contesting confirmation of a Chapter 11 plan of reorganization. If the possibility of incurring defensive costs constitutes an obligation secured by the lender's liens, the lender can argue that, notwithstanding "full" payment, a plan is not "fair and equitable" unless the lender's liens continue to secure such contingent obligations or the lender is provided with a release of all claims by the debtor.

This issue recently arose in an unreported case in the U.S. Bankruptcy Court for the District of Massachusetts. *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig Bishay*, Nos. 95-15015 and 95-16331 (Bankr. Mass.; hearing of 4/23 and 7/27/96) (available from the authors). In that case, the court addressed the lender's request to retain certain of its liens even after full debt payment pursuant to the Chapter 11 plan proposed by the lender, where the borrower had previously asserted state court lender liability claims against the lender.

Under the terms of the lender's plan, the borrower would repay all outstanding principal, interest, costs and expenses currently due to the lender and, as the borrower had refused to execute a release of its claims against the lender, the lender would retain its liens in order to secure payment of any costs that the lender would later incur defending the borrower's lender liability claims following confirmation. The borrower, of course, objected.

In confirming the plan, the court held that, under the terms of the relevant loan documents, the lender's claim included the lender's future contingent costs in connection with the debtor's state court claims against the lender. As a result, in order for the plan to be fair and equitable, the lender was entitled to retain liens on the debtor's property to secure those contingent claims in an amount sufficient to cover such contingent costs (which were estimated at $500,000).

Dealing With an Unsettled Area of the Law

While this area of the law is unsettled, lenders should seriously consider conditioning lien releases on receipt of both full payment and a general release, especially when faced with a borrower that has threatened to later assert claims based on the lending relationship. The lender does run the risk that the borrower will have a claim for damages if a court subsequently decides that the liens should have been released; however, this risk can be alleviated, in appropriate cases, by attempting to build such protections into a Chapter 11 plan or by obtaining protective court orders in the context of out-of-court workouts. ■

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(2)

No. 06-1408

IN THE
SUPREME COURT OF THE UNITED STATES

Bahig Bishay

Petitioner,

v.

Citizens Bank of Massachusetts

Respondent.

On Petition For A Writ Of Certiorari
To The Court of Appeals For The First Circuit

BRIEF IN OPPOSITION

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May 24, 2007

BEST AVAILABLE COPY

RULE 29.6 STATEMENT

The parent corporation of Respondent, Citizens Bank of Massachusetts, is Citizens Financial Group, Inc. No publicly held company owns 10% or more of the stock of Respondent.

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OPINIONS BELOW

This Petition for a Writ of Certiorari fails to inform this Court, or include in the Appendix, any materials related to the first Petition for a Writ of Certiorari filed by this Petitioner against this Respondent and denied by this Court in 2003. See Bishay v. Citizens Bank, 539 U.S. 915, 123 S. Ct. 2280 (2003). That original petition and denial are relevant to this request because the current decision of the First Circuit Court of Appeals dismissing the complaint, from which the Petitioner now seeks leave to appeal, is based on the finding that the state court judgments in the first case were entitled to full faith and credit. A copy of relevant pages of Petitioner's First Petition, Respondent's opposition thereto (including relevant pages of the original state court decisions), and Petitioner's reply brief are reproduced in the Respondent's Appendix here. (R.A., 1a – 46a).[1]

STATEMENT OF THE CASE

The *pro se* Petitioner fails to present any of the bases articulated in Rule 10 of the Rules of the Supreme Court of the United States for entitlement to the rare exercise of this Court's discretion to grant certiorari. More significantly, the questions presented do not even involve the basis of the decision rendered by the First Circuit Court of Appeals from which the Petition flows. The First Circuit affirmed the District Court's dismissal of Petitioner's complaint for the reasons set forth in that court's decision (i.e., impermissible collateral attack on a state court judgment) and because the previous state court decisions are entitled to full faith and credit. (P.A., 2a - 10a). The Petitioner ignores these holdings and, instead, attempts to once again argue his underlying theory of bank collection malfeasance which has

[1] The Petitioner's Appendix will be cited as (P.A.); the Respondent's as (R.A.)

been adversely adjudicated against him time and again. Accordingly, the Petition should be denied.

STATEMENT OF FACTS

This is the thirteenth year of this litigation dispute. A full statement of historic facts appears in the Respondent's Appendix at 9a – 17a. For this Petition, it is enough to recount that Bahig Bishay ("Bishay") brought a series of lender liability claims against Citizens Bank of Massachusetts ("Citizens") by way of counterclaims to a collection action. All of Bishay's claims were dismissed by the Massachusetts Appeals Court, which affirmed the Massachusetts Superior Court summary judgment decisions. Further appellate review was sought from and denied by the Massachusetts Supreme Judicial Court. Thereafter, a petition for certiorari was sought from and denied by this Court. See 539 U.S. 915, 123 S. Ct. 2280.

As part of the Superior Court's summary judgment decisions, Citizens was awarded its attorneys' fees in defending against Bishay's counterclaims. Those fees were reimbursed from a letter of credit ("LOC") that Bishay was required to post in a related bankruptcy proceeding that paralleled the state court action. (R.A., 35a - 46a). The propriety of the award of those fees was argued during the first appeal and the order was affirmed. (R.A., 22a - 33a; P.A., 3a). All of this was resolved by 2003, including the denial of certiorari by this Court.

In 2005, Bishay brought a new complaint in Federal Court. That complaint was styled as one for breach of contract and was ostensibly based on the improper draw on the LOC to reimburse the court-awarded attorneys' fees. The reason alleged for the improper draw was that Citizens had "entered"

into a contract with Bishay pursuant to which it agreed to allow Bishay to "try" his claims before a tribunal. The "contract" allegedly entered into was the Plan of Reorganization approved by the Bankruptcy Court that, among other things, included the requirement that Bishay post the LOC.

The "breach" of this "contract" by Citizens resulted from Citizens moving for summary judgment as opposed to allowing Bishay to have a full-blown trial on all his claims. (P.A., 8a). The basis of the trial court's[2] allowance of Citizen's motion was further evidence of breach because Citizens argued that the Plan of Reorganization was *res judicata* as to many of Bishay's claims. In other words, the same "contract" by which Citizens "agreed" to allow Bishay to try all of his claims was used by Citizens to summarily dispose of those very same claims.

After reviewing these allegations, the District Court dismissed the complaint holding that Bishay was attempting to collaterally attack the State Court decisions in the guise of a contract action tied to the LOC. (P.A., 9a – 10a). The First Circuit affirmed, further noting that the scope of the reservation clause had "already been decided in state court, whose rulings are entitled to full faith and credit. Bishay cannot now relitigate the matter in Federal Court." (P.A., 4a). This Petition followed.

REASONS FOR DENYING THE PETITION

Bishay fails to present any basis on which this Court traditionally exercises its discretion to grant certiorari. He has not argued that the decision of the First Circuit, based as it is on

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[2] The Superior Court in the first action.

straight forward application of preclusion principles, is in conflict with that of another court of appeals; it is not. He has not argued that federal preclusion principles relied on by the First Circuit conflict with those of the Massachusetts Supreme Judicial Court; they do not. Nor has he argued that the preclusion principles relied on by the First Circuit represent an important question of federal law as to which this Court has yet to rule; this Court of course has routinely articulated the parameters of such principles. Instead, Bishay simply argues that the previous state court judgments from the first action were decided incorrectly and thus the current decision of the Federal Circuit is likewise incorrect. This is precisely the type of argument that Rule 10 of the Rules of the Supreme Court states will rarely result in a grant of certiorari. In light of the thirteen years of litigation, the number of courts that have ruled on these issues, and the importance of the concept of finality, the request for certiorari should be denied again.

A. Bishay Does Not Assert a Basis Under Rule 10 For the Grant of Certiorari

Although the bases on which this Court typically grants certiorari are not circumscribed by Rule 10, Rule 10 does set forth the general situations for the rare exercise of this Court's discretion. Thomas v. American Home Prods., 519 U.S. 913, 916, 117 S. Ct. 282, 284 (1996) (Rehnquist, C.J. dissenting). The decision of the First Circuit from which this Petition flows involves the routine application of preclusion principles. Nowhere does Bishay argue that the First Circuit's decision is in conflict with that of its sister circuits. Nor does Bishay argue that the Court's application of these well worn principles conflicts with the application of state law principles by the Massachusetts Supreme Judicial Court. In fact, Bishay argues

nothing about the First Circuit decision whatsoever. Instead, he ignores it completely and simply argues (or more appropriately, reargues) the propriety of the original state court judgments that were decided adversely to him in the first case and over which this Court previously refused to grant certiorari. 539 U.S. 915, 123 S. Ct. 2280. Given the complete absence of any argument as to why the basis of First Circuit decision (i.e., impermissible collateral attack on a state court judgment) warrants review by this Court, this Petition must be denied.

B. All Of This Has Been Decided Before

Bishay posits two issues to justify this appeal: (1) may a lender refuse to release its liens if the borrower repays the debt in full; and (2) whether the Plan of Reorganization approved in an earlier bankruptcy case was a contract that Citizens breached. These were the very same issues that were battled over in the first case that ultimately resulted in a petition for certiorari that this Court rejected. For example, during the first case, Bishay argued that the "refusal to accept full payment of the loan constituted (1) a breach of its obligations to him . . ." (R.A., 29a). The Massachusetts Appeals Court rejected that argument as follows:

> Even if we were to consider those claims not barred by the release and res judicata principles; they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay . . . ."

(Id.)

The characterization of the Plan of Reorganization as a contract that should be interpreted against Citizens and which Citizens breached was also argued in the first action. (P.A., 7a – 8a). The arguments were also specifically addressed in the briefing involving the first petition for certiorari. (See R.A., 4a, 19a – 20a).

It is for these reasons that both the District Court and First Circuit held that the second complaint was an improper collateral attack on the first state court judgment. (P.A., 3a – 9a). This litigation has lasted for over thirteen years. Courts at every level of the state and federal systems have found Bishay's claims meritless. Still Bishay persists, wasting the resources of both Citizens and this Court. The Petition should be denied.

C. There is No Basis to Refuse to Enforce the Preclusion Principles Relied on By The First Circuit

One of the fundamental precepts of our judicial system is that of finality of litigation. This Court has long recognized the central purpose played by issue and claim preclusion principles. E.g., Montana v. United States, 440 U.S. 147, 153-154, 99 S. Ct. 970, 973-74 (1979). Although the *pro se* Petition is not entirely clear, it appears that Bishay is arguing that if left undisturbed, the decision of the Massachusetts Appeals Court will have national implications. Implicit within that assumption is the further assumption that the enforcement of private loan agreements governed by individual state law implicates some larger federal policy. Of course, no legal precedent is cited now, or was cited in the first petition, for such an assertion. Rather, the dispute below was once between a private party and a state chartered bank. The rights and obligations between the

parties were governed by Massachusetts law. The only interplay with federal law concerned the effect to be given a bankruptcy order (i.e., the Plan of Reorganization) in connection with claims emanating from that private banking relationship. Bishay elected to wage that battle in state court. He lost. He sought certiorari for that decision to this Court. The request was denied. He filed a second action in the federal court seeking to undo the state court decision. He lost that gambit. All of this punctuates that this dispute is nothing more than an all too frequent example of a litigant not being able to take no for an answer. It is the reason claim preclusion principles were developed. Bishay argues nothing to cause this Court to ignore the application of those principles. The petition should be denied.

CONCLUSION

For the reasons set forth herein, Citizens requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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May 24, 2007

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No. 02-___

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

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April 7, 2003

QUESTION PRESENTED

The Bankruptcy Code provides that "a plan [of reorganization] may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3).

The question presented is whether, notwithstanding 11 U.S.C. 1123(b)(3), a bankruptcy confirmation extinguishes a debtor's claims against a creditor despite the facts that (a) the plan of reorganization expressly preserves the debtor's right to pursue all claims he may have against that creditor, and (b) the creditor is indisputably aware that the claims have been preserved.

* * *

provision to suggest that the plan must specifically identify each and every claim and/or interest belonging to the debtor that may be subject to retention and enforcement." *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 158 (Bankr. D. Del. 2002). Neither the Appeals Court nor any other court has pointed to any language in the statute or in its legislative history justifying a *per se* rule that a claim may be preserved only if it is identified specifically. To the contrary, the legislative history of Section 1123(b)(3) mirrors the statute itself in contemplating the retention of claims after plan confirmation: "The plan may also provide for the treatment of claims by the debtor against other entities that are not settled before the confirmation of the plan." H.R. REP. NO. 95-595, at 406-07 (1977).

Second, the Appeals Court violated a core principle of contract interpretation. "Because a [bankruptcy] plan is often more akin to a contract than a disputed order, general contract principles ought to be applied to its interpretation." *UNR Indus., Inc.* v. *Bloomington Factory Workers*, 173 B.R. 149, 157 (Bankr. N.D. Ill. 1994); see also *Cohen*, 279 B.R. at 160; *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 592 (D. Del. 2002). This Court has recognized the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The Appeals Court violated this rule by reading the reservation clause out of the contract entirely.

Third, the Appeals Court violated "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62. Bishay's reservation clause is clear and unambiguous; but even if it were not, its ambiguities should be resolved against the drafter — Citizens. In *Peltz*, the court enforced such a clause because, *inter alia*, "[p]rior to a plan's confirmation, creditors have the opportunity to examine the terms of the proposed plan and respond accordingly." 280 B.R. at 592. In *Bishay*,

* * *

No. 02-1479

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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May 9, 2003

QUESTION PRESENTED FOR REVIEW

Whether, assuming this Court has jurisdiction in light of the separate, adequate and independent state grounds supporting the dismissal, the Massachusetts Appeals Court's determination that the confirmation order was res judicata as to the Petitioner's counterclaims against Respondent was correct where the court's decision was based on the facts that:

(a) the plan of reorganization contained general language in the reservation clause;

(b) the Petitioner had ample opportunity to contest the plan or seek its modification; and

(c) statements made by counsel at the confirmation hearing were contradictory.

* * *

majority of courts addressing the issue have ruled consistently with the Appeals Court. The few cases that Bishay cited as articulating a different standard are either distinguishable on their facts or simply dicta.

In any event, what Bishay overlooks is that this Court lacks jurisdiction because the dismissal of Bishay's claims is, from the face of the Appeals Court's decision and the unappealed portions of the Superior Court's decisions, supported on separate, adequate and independent state law grounds. Accordingly, the Petition must be denied.

STATEMENT OF FACTS[5]

On June 8, 1988, Neworld Bank, Citizens' predecessor-in-interest, and Bishay entered into a Revolving Credit Agreement, Demand Note and Personal Guarantee (collectively, the "Loan Documents") in the amount of $2,560,000. (P. App. 12a) The Demand Note contained Bishay's unconditional promise to repay on demand. (*Id.*) The Revolving Credit Agreement reiterated the fact that the obligation was payable on demand, but in no event was to be repaid later than June 8, 1989. (P. App. 13a) Bishay did not repay the loan in 1989. Instead, between June 1989 and August 1993, the date for repayment of the debt was extended seven times – the first three times in the form of extension agreements; the last four as forbearance agreements. (P. App. 14a-15a) The last of these extensions, agreed to in August 1993, set a new maturity date of June 30, 1994. (P. App. 15a) This extension also required Bishay to make monthly principal payments of $7,500, plus accrued interest. (*Id.*) On

5. The majority of the facts set forth herein are restated in either the Appeals Court's or the Superior Court's decisions. Those that are not are taken from the 12 volume record appendix that accompanied the appeal before the Appeals Court. *See* Sup. Ct. R. 12.7.

April 14, 1994, Neworld merged into Citizens. (P. App. 16a) On April 18, 1994, Bishay wrote to Neworld and informed it that he was ceasing monthly principal payments due to cash flow problems caused by large expenses incurred in the start up of a new Isuzu automobile dealership. (P. App. 15a) On May 9, 1994, Citizens sent a written default letter to Bishay. (P. App. 16a) Following Bishay's continuing payment default in May 1994, Citizens accelerated the debt by letter dated June 15, 1994. (*Id.*) The August 1993 forbearance agreement otherwise would have matured by its terms two weeks later on June 30, 1994.

Over the next 2½ months, Citizens and Bishay negotiated yet another forbearance agreement, which was ultimately executed on September 16, 1994 (the "September 1994 Agreement"). (P. App. 17a) During this 2½ month period, Bishay was also in negotiations with the Federal Deposit Insurance Corporation (the "FDIC") to work out an unrelated default of a loan that was secured by one of Bishay's properties (1095 Comm. Ave.), which happened to also constitute additional security for the Citizens loan.[6] While negotiating with Bishay, Citizens contacted the FDIC to determine whether it might purchase the FDIC loan so that Citizens would obtain a first lien position on that property to further secure its loan. Nothing came of these discussions (P. App. 16a); however, because they occurred, Bishay leveled repeated allegations of wrongdoing against Citizens during this negotiations period. (*Id.*) Ultimately, a new forbearance agreement was agreed to in the form of the September 1994 Agreement. The September 1994 Agreement provided that: (1) the maturity date was extended to July 31, 1995; (2) Bishay was obligated to make a $1 million partial principal payment on or before January 31, 1995; and (3) Bishay (and any related entities)

6. Citizens held a second mortgage behind the FDIC.

released all possible claims against Citizens and Neworld. (P. App. 17a-18a)

Bishay failed to make the required $1 million partial principal payment in January 1995. (P. App. 18a) On February 10, 1995, Citizens again executed an extension agreement extending the $1 million payment obligation until April 30, 1995. (*Id.*) On or about March 24, 1995, Bishay made a partial payment of approximately $750,000 towards this $1 million interim obligation. (P. App. 18a-19a) Bishay made no further payments prior to April 30, 1995, and, on May 4, 1995, Citizens again accelerated the obligation. (P. App. 19a) Citizens commenced this action in the Superior Court in June 1995 to recover the balance of the outstanding debt, plus continually accruing interest and costs of collection. (*Id.*)

Bishay filed an answer and counterclaim asserting two counterclaims based solely on Citizens' conduct in the "summer and fall of 1994" that allegedly constituted a breach of the implied covenant of good faith and fair dealing and a violation of Massachusetts General Laws, chapter 93A ("c. 93A"). (*Id.*) Soon thereafter, both Bishay's and 1095 Comm. Ave.'s bankruptcy petitions were filed by Bishay. (P. App. 19a-20a) On November 1, 1995, Bishay and 1095 Comm. Ave. filed a Joint Disclosure Statement (the "Debtors' Disclosure Statement") and Proposed Plan of Reorganization. The Bankruptcy Court refused to approve the Debtors' Disclosure Statement (and, as a result of the preclusion from soliciting creditors' votes, the Proposed Plan of Reorganization), ruling, on December 13, 1995, that it failed to contain adequate information. On December 27, 1995, the Bankruptcy Court appointed a Trustee for Bishay's bankruptcy estate, supplanting Bishay as debtor-in-possession.

In early November 1995, Bishay's counsel made a single inquiry of Citizens' counsel concerning the hypothetical terms of a payoff of Citizens' loan. (R. App. 8a and n.11) Citizens responded that the terms would include payment in full plus a general release of all claims, real or imagined. (*Id.*) Bishay never pursued the issue further; never tendered any money whatsoever; and, indeed, never produced a commitment letter from any new financing source. (*Id.*)

On April 23, 1996, following a two-day evidentiary hearing, the Bankruptcy Court issued an order (the "Confirmation Order") confirming the Chapter 11 plan first proposed by Citizens, as amended by the First and Second Modifications to Chapter 11 Plan (collectively, the "Plan"). (P. App. 20a) The Plan provides, in relevant part, that Citizens' claim is "allowed" in its entirety, and that Bishay's and 1095 Comm. Ave.'s estates "may retain . . . settle, release or prosecute their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims")." (P. App. 23a-24a) The only claims that were alleged at the time of confirmation were the two counts in Bishay's pending counterclaim. (P. App. 25a) The Plan also provided for a continuing $500,000 lien on Bishay's assets to secure Citizens' contractual right, under the Loan Documents, to be reimbursed for fees and costs that it might incur in defending itself against Bishay's counterclaims. (P. App. 32a) The amount of the lien was established following an open court colloquy between the judge and counsel in which Citizens' lawyers asserted that Bishay was an excessively litigious individual who had the propensity to litigate out of proportion to the merits of the case. Litigation between Bishay and an unrelated party was highlighted to support this assertion. In response, Bishay's counsel stated that the then-pending two-count counterclaim was discrete and limited and thus only a small lien should be

allowed.[7] Finally, the Plan identified Citizens' claim as "impaired" because repayment of the defaulted loan was not

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7. The colloquy between the Judge and Bishay's counsel (Mr. Murphy) was as follows:

> THE COURT: . . . I want to hear you on why you think $500,000 is excessive. And as I recall what Mr. Baldiga's argument was on Thursday was — and Mr. Baldiga can correct me if I am wrong — but basically he was saying, "Mr. Bishay is litigious." . . . I mean that was what I understood his argument was for the $500,000, but I am willing to hear your argument as to whether it should be some different number.
>
> MR. MURPHY: Oh. I think it should be. I think equating the — what I understand to be the extraordinarily complicated facts and circumstances surrounding the *Chambers* litigation is far different from what I've read a counterclaim that was asserted pre-petition against the Bank in that — in the Norfolk Superior Court which basically said that the bank was engaging in unfair deceptive practices. The bank had coerced him into executing a forbearance agreement, and I think there was one other allegation in the complaint.
>
> * * *
>
> MR. MURPHY: . . . a discrete counterclaim . . .
>
> * * *
>
> THE COURT: . . . I certainly can look at the answer and counterclaim and make some determinations as to how involved the litigation is. . . .
>
> * * *
>
> THE COURT: . . . I also have looked at the defendants' answer and counterclaim. Is there any testimony you want to put on or offer of proof that you want to make,
>
> (Cont'd)

immediate; rather, repayment would not occur until the ensuing December.[8] Bishay never appealed the Confirmation Order.

Two months after confirmation, in June 1996, Citizens served its first summary judgment motion in the Superior Court seeking dismissal of the two-count counterclaim. (P. App. 21a) In August, Bishay sought leave to file an

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> Mr. Murphy, with respect to supporting your $250,000 set-aside?
>
> * * *
>
> MR. MURPHY: I have nothing further to add. . . .
>
> * * *
>
> THE COURT: . . . I find that $500,000 is fair for the following reasons: based on the offer of proof that — with respect to what the cost of the *Chambers* litigation to date has been, based on my own experience litigating lender liability actions in this Court, and based on the — my reading of the defendants' answer and counterclaim and jury claim in the Norfolk Superior Court action as well as the Affidavit of Mr. Bishay, it seems reasonable for me to conclude that Citizens accepting $500,000 — a $500,000 lien on the assets of 75 Providence Highway is fair.

8. Bishay repeatedly confuses the meaning of an impaired claim under the Bankruptcy Code. A claim is impaired when it is paid in a manner different than that required by the contract creating the obligation in the first instance. Where a debt is due and owing as of the date of the filing of the petition for bankruptcy, a plan that proposes anything other than immediate and total payment renders a claim impaired. *See* 11 U.S.C. § 1124; *In re Tri-Growth Centre City, Ltd.*, 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992) (claim is impaired where proposed plan did not pay defaulted loan as of date of plan).

amended counterclaim.[9] The Superior Court allowed Bishay's motion to amend and denied Citizens' motion for summary judgment, "without prejudice to being renewed as to the amended answer and counterclaim. . . ." (*Id.*)

The new claims asserted by Bishay were not identified in his bankruptcy schedules nor in the Disclosure Statement the Bankruptcy Court otherwise found deficient. Bishay never initiated an adversary proceeding against Citizens alleging these claims prior to confirmation. While Bishay had written a rambling letter to Citizens' Chairman, Lawrence K. Fish, in mid-October 1995 expressing his general dissatisfaction with the entire history of his banking relationship with Citizens up to that point in time,[10] he never followed up on

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9. The amended counterclaim alleged the following six counts: Count I (breach of good faith and fair dealing); Count II (promissory estoppel); Count III (intentional interference with contractual and advantageous relations); Count IV (declaratory judgment as to the validity of the September 1994 Agreement); Count V (intentional infliction of emotional distress); and Count VI (violations of c. 93A). The original two counts of the counterclaim were restated in part in Counts III and VI of the amended counterclaim. The dismissal of those two counts on pure state law grounds has not been appealed.

10. One of the factual misstatements in the Petition is the assertion that this letter contained all of Bishay's claims against Citizens and thus Citizens was on notice of such claims at the time of confirmation. This is wrong. What ultimately became the focus of Bishay's state court claims once his claim of wrongful acceleration was dismissed, was the assertion that Citizens wrongfully refused full repayment of the loan in November 1995. This refusal allegedly prevented Bishay from securing the release of Citizens' liens on $18 million of real estate, which, in turn, prevented him from engaging in an initial public offering, the proceeds from which were earmarked for the opening of a series of automobile superstores across the country that, over the ensuing ten-year period, would have generated profits of over $90 million. Plainly, the October 1995 letter

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that letter in any manner whatsoever in the ensuing six months leading up to the confirmation hearing. As seen earlier, as of the confirmation hearing, Bishay's own lawyer disavowed any claims against Citizens other than the two discrete claims set forth in his pending counterclaim.

In May 1997, Citizens filed its second summary judgment motion seeking dismissal of Bishay's entire counterclaim. (P. App. 21a) In November 1997, the Superior Court allowed Citizens' motion in part and denied it in part. (P. App. 34a) As to the four new counterclaims alleged by Bishay, the court held that they were barred by the res judicata effect of the Plan. The Superior Court held that "any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify the cause of action reserved." (P. App. 24a) Here, the "language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in the Superior Court at the time of the Order." (P. App. 26a)

As to the two previously pending claims that alleged untoward conduct prior to September 16, 1994, the Superior Court held that those claims were barred by the general release executed by Bishay as part of the September 1994 Agreement.[11] (P. App. 27a-31a) Five subsections of Bishay's

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could not have put Citizens on notice of a claim predicated on alleged conduct that was then over a month from occurring. Significantly, the Appeals Court held that Bishay never tendered payment as alleged and that Citizens never wrongfully refused to accept any such payment. (R. App. 8a and n.11)

11. Bishay sought to vitiate the general release by alleging economic duress. That defense was unsuccessful, and Bishay did not appeal that determination. Indeed, on appeal to the Appeals Court, Bishay argued for reinstatement of those claims only to the extent they alleged conduct post-September 1994. (*See* R. App. 7a)

c. 93A claim survived the first summary judgment motion. (P. App. 34a) Ultimately, after two cross-motions for reconsideration, these five subsections were dismissed on the basis of res judicata,[12] the doctrine of absolute privilege and the inability to prove damages as required under c. 93A. (R. App. 19a-26a; 35a-38a)

Bishay appealed to the Appeals Court which affirmed all of the judgments of the Superior Court.[13] The Appeals Court adopted the reasoning of the Superior Court and found "no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim." (R. App. 4a-5a at n. 6.) The Appeals Court further found no merit to Bishay's assertions that: (1) the classification of Citizens' claim as impaired meant approval of that claim was not final; (2) he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens; or (3) the court should consider statements made by Citizens' counsel at the confirmation hearing. (*Id.*)

The Appeals Court alternatively found that all claims based on post-September 1994 conduct were dismissable for failure of proof. (R. App. 7a-9a)

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12. This dismissal based on res judicata is different from that being appealed here. It arose from the Bankruptcy Court's decision available at *In re 1095 Comm. Ave. Corp.*, 204 B.R. 284. *See* footnote 3, *supra*.

13. The Appeals Court's decision is an unpublished summary decision pursuant to its Rule 1:28. Such decisions "are not to be relied upon or cited as authority in unrelated cases." *Lyons v. Labor Relations Comm'n*, 19 Mass. App. Ct. 562, 566 (1985), *rev'd on other grounds*, 397 Mass. 4981 (1986). This rule exists because such decisions are not vetted by the entire court and, while binding on the parties, may not disclose fully the facts of the case or the rationale of the judges' decision. *Id.* at 566 n.7.

* * *

As the Southern District of Texas aptly stated:

> The institution of bankruptcy exists to give debtors a fresh start, not to allow debtors to seek revenge against creditors who were difficult in earlier business dealings. General retention clauses are not convenient hiding places for debtors. While a debtor is not forced to abandon claims before they are known, a debtor must disclose those claims that are likely. A claim with potential is a potential asset. The creditors have a right to know what the debtor's assets are even though the potential may be contingent, dependent, or conditional. While [the debtor] did not have to give an exact dollar value for the claim, it was obliged to give an estimate. Rather than make a good faith attempt at disclosure, [the debtor] chose not to estimate a value for this claim on the ground that "causes of action are difficult to value." The code requires adequate disclosure, not selective disclosure. Because [the debtor] failed to disclose its claim against [the creditor], it will be barred.

Westland Oil Dev. Corp., 157 B.R. at 103.

1. There Is No Basis For Interpreting The Plan Against Citizens

Faced with his own failure to properly preserve the claims he first filed post-confirmation, Bishay proffers here, as he did below, several arguments why the reservation clause should be rewritten. One of his arguments is that the Plan is essentially a contract that was drafted by Citizens, and thus should be interpreted against Citizens (i.e., expansively). However, Bishay's argument overlooks the essential nature

of the confirmation process and the basic obligations each party has to protect its own interests. In the first place, a confirmed plan is simply not subject to rules of contract construction. As one court put it:

> [a] creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable.

Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982).

Moreover, the Plan, though originally presented by Citizens due to Bishay's intransigence in putting forth his own plan, was not simply accepted by the court or the parties. Rather, it was subject to significant input from all sides. In this context, it was up to Bishay (and his lawyers) to be sure Bishay's claims were preserved to the extent he wanted them preserved. As the court stated in *In re DiBerto*:

> The confirmation of a plan under Chapter 11 creates new contractual obligations of the reorganized debtor. In that context, parties-in-interest are obligated to make sure that they have no problem with the literal language of the new contractual obligations and provisions dealing with the disposition of the assets of the debtor.

171 B.R. 461, 477 (Bankr. D.N.H. 1994).[16]

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16. To the extent that Bishay is dissatisfied with the legal effect of the language agreed to in the Plan, that is an issue between Bishay and his bankruptcy counsel. *See In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 546 (M.D. Tenn. 1983) (parties "may not be relieved

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* * *

APPENDIX A — MEMORANDUM AND ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 22, 2002

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-P-798

CITIZENS BANK OF MASSACHUSETTS

vs.

BAHIG BISHAY[1] & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal by the defendants (collectively Bishay), is from the entry of a judgment ordered in 1999 by a Superior Court judge in favor of Citizens Bank for $360,427.99 for attorney's fees and costs which were allowed as reasonable collection costs relating to a loan made to Bishay in 1988 (A.4225,4229). Bishay also appeals from three prior summary judgement orders of the same judge which dismissed his

1. Individually and as trustee of Old Post Road Realty Trust and Commonwealth Realty Trust.

2. Bishay Motors & Leasing, Inc., formerly known as Bishay Motors, Inc.; Massachusetts Auto. Group, doing business as Bishay Isuzu; U.S. Auto Exchange Group Ltd.; and 1095 Commonwealth Ave. Group (A.2).

counterclaims against Citizens Bank related to its collection of the loan (A.4230). The loan was repaid through a proceeding in the United States Bankruptcy Court, concluded pursuant to a confirmatory order issued in 1996 (A.288,4230).

In this appeal, Bishay principally presents the issue whether, and to what extent, his rights were preserved in the bankruptcy proceeding to pursue his counterclaims against Citizens Bank in the Massachusetts courts (B.Br.3-4). He argues that the Superior Court judge's rulings, principally based on res judicata grounds, did not reach the full extent of those claims and thereby deprived him of his day in court. We conclude the judge's decisions were correct and affirm.

Citizens Bank commenced this action in June, 1995, by filing a verified complaint in the Superior Court (A.19). Bishay's answer contained a counterclaim in two counts, the first alleging a breach of good faith and fair dealing, and the second an alleging unfair trade practices under G.L. c. 93A (A.70,74). Bishay then filed two voluntary petitions in bankruptcy, the first in July, 1995, for 1095 Commonwealth Ave. Corp., and the second, individually, in September, 1995, which subsequently were consolidated for administration (A.218). The plan, confirmed by order of the Bankruptcy Court in April, 1996, permitted Bishay to pursue his counterclaim.[3] After Citizens Bank moved in the Superior Court to dismiss the counterclaim in June, 1996, Bishay moved to

3. The plan allowed Citizens Bank's claim for payment of the loan balance and also allowed retention of a lien on Bishay's assets to permit recovery of attorney's fees and costs in defending against Bishay's counterclaim (A.279-280).

amend it, and the amendment was allowed by a motion judge in November, 1996 (A.690), resulting in a counterclaim of six counts (A.692-726). Four decisions by a different Superior Court judge followed, resulting in the dismissal of Bishay's entire amended counterclaim and the award of collection costs to Citizens Bank.

1. *Application of res judicata.* In the first of the Superior Court orders challenged by Bishay in this appeal, the judge considered the parties' cross motions for summary judgment on Bishay's several counts in the amended counterclaim (A.2205,2216). The judge correctly stated the controlling principle as follows: "The application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on all claims and issues concerning the debtor-creditor relationship that were actually raised during the confirmation process as well as those that could have been raised. . . ." (A.2219). See *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 & n.8 (1st Cir. 1995) (res judicata principles applicable to confirmation orders of a bankruptcy court). "Under a generally accepted exception to the res judicata doctrine, a party's claims are not precluded by a prior action if the court in that action expressly reserves those claims for later adjudication. *Apparel Art Intern. v. Amertex Enterprises[, Ltd.]*, 48 F.3d 576, 586 (1st Cir. 1995). *D & K Properties Crystal Lake v. Mutual Life Ins. [Co.]*, 112 F.3d 257, 260 (7th Cir. 1997)." (A.2220).

The judge reviewed the relevant language in the reservation clause of the plan confirmed by the Bankruptcy

Court,[4] correctly concluding from its wording and the record in that court that the original two counts in Bishay's counterclaim had not been adjudicated in that court and had been preserved so as to survive the confirmation order. Moreover, he stated those two counts "constitute independent claims which could be characterized as a set-off to Bishay's debt." (A.2222).

In contrast, however, the judge concluded that the additional four claims in the amended counterclaim[5] were in the nature of defenses to Bishay's obligations under the note, and that he essentially sought to relitigate the validity of that note and the forbearance agreement.[6] These additional

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4. "The Debtors' estates may retain, and by its duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." (A.280).

5. We adopt the judge's summary description of the counts as follows: (I) allegations of "numerous breaches of [Citizens Bank's] express and implied duties" under the note and a forbearance agreement; (II) a claim that Citizens Bank is "estopped from treating the Note as a demand obligation and collecting the full amount"; (III) first count of prior counterclaim restated; (IV) a request for a declaratory judgment that the "Note and Forebearance Agreement are extortionate," and all payments should be ordered disgorged; (V) a claim of intentional infliction of emotional distress; and (VI) second count of prior counterclaim restated. (A.2222-2224; 712-724).

6. There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would

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eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *D & K Properties Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d at 261.

Bishay's assertion that classification of Citizens Bank's claim as "impaired," means that approval of the claim was not final (B.Br.18), is without merit. That assertion ignores the plain language of section 6(a) of the reorganization plan which required full payment of the loan balance on or before December 27, 1996 (A.279). Further, no reasonable reading of 11 U.S.C. § 1124 (1984) supports that assertion.

There also is no merit in Bishay's assertion that he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens Bank. Compare *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (approval of a plan by a creditor "cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable"). Moreover, there is no indication that Bishay did not have adequate opportunity to contest the plan or seek its modification.

Similarly, there is no merit in Bishay's request that we consider statements made by counsel for Citizens Bank at the confirmation hearing (B.Br.20-23). Compare *Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (even comments by a judge in a colloquy with debtors were "not dispositive of . . . allegedly reserved right," and did not affect application of res judicata principles). In the judge's third decision he stated, "Bishay now asks this Court yet again to adopt his interpretation of the reservation [clause]. This the court declines to do." (A.3392). We similarly decline any invitation by Bishay to consider any reinterpretation by reading any "intent" into the reservation clause (see B.R.Br.2-8).

claims were not expressly identified in the reservation clause, the bankruptcy schedules (A.3224-3267), or in the previously filed counterclaim in Bishay's answer to Citizens Bank's complaint.[7] Because the Bankruptcy Court ordered the payment of Citizens Bank's claim, inherent in that order is the court's determination of the validity and enforceability of the note and forbearance agreement. The judge therefore properly stated that "[f]inal orders of the bankruptcy court are res judicata as to all matters that were or could have been litigated before the bankruptcy court," see *Federal Deposit Ins. Corp. v. Shearson-American Exp., Inc.*, 996 F.2d 493, 497 (1st Cir. 1993), cert. denied, 510 U.S. 1111 (1994), and correctly concluded that the confirmation order had res

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7. The judge noted that the Bankruptcy Court allowed a joint motion on September 4, 1996, authorizing Bishay to employ special counsel to pursue the litigation then pending in the Superior Court, No. 95-1312A (A.2222 n.10).

There is no merit in Bishay's assertion that the counts in his amended counterclaim were preserved because his proposed version of that counterclaim was attached to a stipulation filed in the Bankruptcy Court with respect to a fee dispute. That filing occurred before the joint motion was allowed, and there is no indication that the amended counterclaim was brought within the scope of that motion.

In any event, the amended counterclaim was first filed in the Superior Court in August, 1996, some four months after the confirmation order dated April 23, 1996 (A.294), and after the expiration of the applicable bankruptcy appeal period. Bishay did not appeal the confirmation order.

judicata effect as to counts I, II, IV, and V of Bishay's amended counterclaim (A.2219,2224).[8]

2. *The surviving claims in the amended counterclaim.* Bishay seeks to pursue his dismissed amended count III and most of the count VI claims by raising events which occurred after the general release in a September 16, 1994, forbearance agreement he executed.[9] He argues that these counts were preserved by the reservation clause, and he asserts that the judge improperly dismissed those claims, essentially ignoring the effect of the release and res judicata (B.Br.27-48).[10]

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8. The judge subsequently denied Bishay's two motions for reconsideration of these rulings in his second and third decisions (A.2481-2482, 3391-3395).

9. In his first decision, the judge addressed Citizens Bank's contention that the general release served as a defense to count III and so much of count VI concerning events occurring prior to the release, and Bishay's claim that the release was not binding because he signed it under economic duress (A.2225). The judge's conclusion that Bishay's failure timely to object to the forbearance agreement, his subsequent conduct in accepting the benefits of Citizens Bank's forbearance, and his partial performance in making sporadic payments, constituted ratification of the agreement. The judge further concluded that because the general release was valid and binding, Bishay is precluded from asserting any claim against Citizens Bank arising from their relationship prior to September 16, 1994, and allowed summary judgment for Citizens Bank on count III and subsections a, b, c, d, e, g, h, and i of count VI (A.2229).

10. In the judge's second decision, he declined to reconsider his prior rulings on count III after Bishay filed a motion for reconsideration and submitted a joint stipulation which contained

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Appendix A

Bishay asserts that in 1995, Citizens Bank's refusal to accept full payment of the loan constituted (1) a breach of its obligations to him; (2) interfered with his business obligations; and (3) violated c. 93A (B.Br.31).[11] Even if we were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c. 93A claim to the extent that it was based on Citizens Bank's collection efforts. Also, Bishay's argument (B.Br.36-44) attempting to revive his claim for intentional infliction of

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a proposed amended counterclaim. The judge rejected consideration of Bishay's claims alleging interference with contractual relations after the September 16, 1994, release, and declined to alter his ruling that only the two claims pending in the Superior Court at the time of the bankruptcy confirmation order had been preserved (A.2477-2479, 2481-2482).

11. The related factual background is that after filing the bankruptcies, in November, 1995, Bishay asked what terms Citizens Bank would require to discharge all its security for the defaulted loan if he could obtain financing to repay the loan. The response was that a release of all theoretical claims would be required (A.642-646). Bishay claims the collateral then securing the loan balance of $2.4 million was, disproportionally, worth $18 million (B.Br.30).

emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive, and unscrupulous and violative of c. 93A, fail to raise genuine issues of material fact.

With respect to Bishay's c. 93A argument (B.Br.45-48) based on Citizens Bank's two-tiered billing arrangement with its attorneys, for which it was sanctioned in the Bankruptcy Court (A.1310-1350), Bishay asserts that a causal relationship existed between that arrangement and Citizen Bank's refusal to accept payment of the loan in 1995, and contrary to the judge's conclusion, that he suffered damages. There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were caused by Citizens Bank's involvement in the two-tiered fee arrangement (A.3396-3398).[12]

3. *Award of attorney's fees.* In his fourth decision, and after a thorough analysis of the parties' claims, the judge determined that Citizens Bank had a right to recover $360,427.99 in attorney's fees and costs incurred as the

12. Acting on a motion of Citizens Bank for reconsideration, the judge addressed the c. 93A issues raised in subsections f and k of count VI in his third decision (A.3396). He concluded that Bishay had not suffered any monetary loss in the course of the Bankruptcy Court's resolution of the two-tiered fee issue. He explained that "the amount of fees owed by Bishay was reduced to reflect the amount Citizens [Bank] itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens [Bank] under the loan agreement." (A.3397).

reasonable costs of collection of the loan from April 25, 1996, through November 30, 1998 (A.4224). Bishay claims that the note was paid "some time before a substantial part of those legal fees were incurred," and accordingly when the note was paid, the fees incurred thereafter could not constitute reasonable fees for "collection and enforcement" of the note (B.Br.49). Arguing this point for the first time in this appeal (see memorandum in opposition to summary judgment at A.3702-3721), Bishay is not entitled to consideration of that argument in this court. See *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977).

In any event, Bishay fails to show that the language of the note (A.32), his guarantees (A.40,44,56), or the relevant provisions of the Bankruptcy Court's approval of a lien on his assets (A.280), restricted his contractual obligations after the note was paid. He also fails to show how the fees awarded were not related to litigation arising out of the collection process, or that there was any error in the judge's thorough analysis of the course of this litigation (A.4216-4224).[13] The judge properly concluded that "Bishay vigorously pursued his purported $100 million counterclaim against [Citizens Bank] to no avail, despite his clear contractual obligation to pay . . . collection costs in the event his claim

13. The judge noted that the fees requested represented nearly two thousand hours of work, that Bishay asserted a counterclaim he valued at $100 million, involving complex issues of bankruptcy law, res judicata, contract, and c. 93A, and the filing of over one hundred pleadings. He stated that "every point on every issue was vigorously contested by both parties," and that Citizens Bank ultimately succeeded in obtaining judgment in its favor on Bishay's entire counterclaim (A.4220).

was unsuccessful." (A.4224). Although Citizens Bank's claim with respect to the unpaid loan balance was satisfied on December 27, 1996,[14] because Citizens Bank's complaint and Bishay's counterclaim then were pending in the Superior Court, it cannot be said that the parties had reached an end to all "charges of the holder . . . in connection with the collection and enforcement of [the note]." (A.32). Bishay's counterclaim was grounded in allegations of improper conduct by Citizens Bank in collecting the note, which Bishay not only pressed after the note had been paid, but had he been successful, he essentially would have overturned the validity of Citizens Bank's collection of the note. Citizens Bank incurred additional fees and costs in withstanding Bishay's continuing attack on the validity of its collection of the note, and those fees and costs properly were an integral part of the collection process. Compare *Penney v. First Natl. Bank of Boston*, 385 Mass. 715, 723 (1982) (attorney's fees and costs incurred by bank in defending against debtor's action brought after sale of debtor's collateral "were an integral part of the collection process").[15] See *Leventhal v. Krinsky*, 325 Mass. 336, 342 (1950); *Covich v. Chambers*, 8 Mass. App. Ct. 740, 752 (1979).

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14. The Bankruptcy Court order regarding discharge of debtors states in relevant part: "In accordance with the terms of the Confirmed Plan, all claims of creditors were satisfied in full on December 27, 1996 with the exception of certain legal fees and costs of Citizens Bank. . . ." (A.3070-3071).

15. Bishay no longer challenges the judge's conclusion that Citizens Bank was entitled to $117,765.24 in fees as a prevailing party in connection with its first motion for summary judgment, an amount which was included in the total award (A.4223-4224).

Appendix A

4. *Costs incurred after judgment and in this appeal.* Citizens Bank requests attorney's fees and costs it claims were allowed in the Superior Court, and to March 17, 1999, when the award was entered (C.B.Br.45-46). Because this request concerns matters beyond our purview in another court, we decline to consider the request. Citizens Bank may, however, request its attorney's fees and costs in connection with this appeal by filing a petition with this court, together with the necessary back-up materials, within fifteen days of the issuance of the rescript in this case. Bishay shall have ten days to respond to that submission, in accordance with *Yorke Mgmt. v. Castro*, 406 Mass. 17, 20 (1989).

Judgments affirmed.

By the Court (Jacobs, Cypher,
& Kantrowitz, JJ.)

s/ Ashley Ahern
Clerk

Entered: October 22, 2002.

* * *

APPENDIX D — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED MARCH 17, 1999 AND FILED MARCH 18, 1999

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR AWARD OF COLLECTION COSTS AND DEFENDANTS' CROSS-MOTION FOR ENTRY OF SEPARATE JUDGMENT

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

* * *

Appendix D

II. CITIZENS' MOTION FOR APPROVAL OF AWARD OF COLLECTION COSTS

Citizens now seeks an award of attorneys fees and costs in the amount of $360,614.63 incurred through November 30, 1998 in defending against Bishay's unsuccessful counterclaim. The original promissory note dated June 8, 1988 provided:

> The maker agrees to pay all charges of the holder hereof in connection with the collection and enforcement of this Note, including reasonable attorneys' fees.

Similarly, Bishay's guaranty of the note provided:

> Guarantor agrees to pay a reasonable attorney's fee and all other costs and expenses which may be incurred by Lender in the enforcement of Borrower's obligation or [sic] this Guaranty or both.

The September 16, 1994 Forbearance Agreement signed by Bishay also provided that he would pay the legal fees and expenses incurred by Citizens in connection with the Note.

In confirming Bishay's Chapter 11 Plan, the Bankruptcy Court (Keener, J.) concluded:

> Citizens is entitled under its loan documents, specifically Plaintiff's Exhibit 6, to retain its liens on all assets until all of its claims are fully

> satisfied. Citizens' claims include not only principal, interest, costs and attorneys' fees accrued to date but future contingent costs in connection with the debtor's state court counterclaims against Citizens Bank.

The Confirmed Plan thus provides that:

> until Citizens actually receives (in form and substance reasonably acceptable to it) a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claims.

On January 22, 1998, Citizens and Bishay agreed to replace the $500,000 lien on Bishay's assets with an irrevocable Letter of Credit issued by Ocean Bank of Miami, Florida.

A. *NECESSITY OF A HEARING*

As a threshold matter, Bishay seeks an evidentiary hearing on the matter of Citizens' collection costs. With respect to an award of fees or costs, "a losing party who seeks to challenge factual issues raised by the affidavits and vouchers of the prevailing party must have an opportunity to be heard." *Waldman v. American Honda Motor Co.*, 413 Mass. 320, 328 (1992). See also *Boynton v. Tarbell*, 272 Mass. 142, 146 (1930) (probate court award of attorney's

fees against estate); *In re Matter of a Grand Jury Subpoena*, 411 Mass. 489, 501 (1992) (court's discretionary award of expense reimbursement to recipient of subpoena duces tecum); *J.P. Construction Co., Inc. v. Stateside Builders, Inc.*, 45 Mass. App. Ct. 920, 920 (1998) (award of attorney's fees under G.L. c. 149, § 29).

Under Massachusetts law, where one party contracts to pay the other's attorney's fees, the standard for recovery is fair and reasonable compensation for the services rendered. *Margolies v. Hopkins*, 401 Mass. 88, 93 (1987); *MIF Realty, L.P. v. Fineberg*, 989 F. Supp. 400, 402 (D. Mass. 1998). The court should consider time expended, customary hourly charges, the attorney's reputation, the demand for his services, the stakes involved in the case, the results secured, and the customary charges for similar services by others. *Cummings v. National Shawmut Bank of Boston*, 284 Mass. 563, 565 (1934); *Margolies v. Hopkins*, *supra* at 93. The documents in the present case explicitly require the fees recovered by Citizens to be reasonable.

A review of the record reveals that Bishay's brief has failed to sufficiently challenge Citizens' affidavits and vouchers to raise a factual issue which would necessitate a hearing. In demanding a hearing, Bishay does not contend that the number of hours spent on the litigation or the rate charged are unreasonable, issues that might require testimony beyond the parties' written submissions. Rather, his only specific objections to the fees are that he should not have to pay the $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or fees incurred in resisting Bishay's June 12, 1997 motion to

compel, which was granted. In addition, he contends that the Stoll affidavit claims entitlement to fees Citizens was not obligated to pay by contract. These legitimate concerns can be adequately and fairly addressed based on a careful review of the extensive documentary record before this Court.

B. *FEE AWARD*

Having carefully reviewed Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court makes the following award of collection fees and costs.

1. *General Findings*

Brown, Rudnick, Freed & Gesmer, P.C. (Brown, Rudnick) has represented Citizens in the present litigation since April of 1996. Attorney James W. Stoll (Stoll), who has been the principal attorney for citizens in this case, has 14 years experience in practice and has represented numerous banks as well as the FDIC in lender liability matters. Stoll was assisted primarily by Attorney Elise Busny, who has five years experience in practice, and by paralegal Susan Oldham.

Pursuant to the fee agreement between Citizens and Brown, Rudnick, Citizens was billed for services at a blended rate of $205 per attorney per hour. This Court finds the blended rate to be fair and reasonable. Indeed, said rate is lower than Brown, Rudnick's standard rates, which are commensurate with those charged at other firms of a similar

size and reputation. For example, Stoll's regular hourly rate varied from $275 to $325 during the period relevant to this litigation. In addition, pursuant to the fee agreement, Citizens was billed for paralegal services at the standard rate of $130 per hour. This Court also finds this rate to be fair and reasonable.

Two affidavits by Stoll set forth itemized invoices billed to Citizens by Brown, Rudnick for the period from April 25, 1996 through November 30, 1998. These invoices represent $329,207.55 in fees for close to 2,000 hours of work, as well as $31,407.08 in expenses. While this amount is large, it should be emphasized that at issue in the present litigation was a counterclaim which Bishay consistently asserted was worth $100 million. Since May of 1996, in excess of one hundred pleadings have been filed in this matter, none of which has been brief. Indeed, every point on every issue was vigorously contested by both parties. Bishay's counterclaim involved complex issues of bankruptcy law and res judicata as well as more basic contract and Chapter 93A matters. Through a series of decisions by this Court, Citizens ultimately succeeded in obtaining judgment as a matter of law on Bishay's entire counterclaim.

2. *Bishay's Objections*

This Court will now address each of Bishay's objections to Citizens' receipt of collection costs. Bishay first raises the familiar refrain that Citizens' misrepresentations with respect to its dual billing agreement with Brown, Rudnick bars it from recovering any collection costs under the loan documents. This argument has already been twice rejected,

first by the Bankruptcy Court in the fall of 1996, and then by this Court in its November 27, 1997 Memorandum and Decision of Order on Bishay's cross-motion for summary judgment. Notwithstanding Bishay's persistence in pressing such a claim, this Court declines to find Citizens' entitlement to collection costs to be affected by the existence of the dual billing agreement and its conduct before the Bankruptcy Court with respect thereto. Bishay also makes a cursory argument that Citizens should be barred from recovery because it has made repeated misrepresentations to this Court throughout the course of the present litigation. Bishay's allegations in this respect are wholly unsubstantiated and serve only to highlight his unwillingness to honor his contractual obligation to reimburse Citizens for its fees and costs in defending against his unsuccessful counterclaim.

Bishay further contends that Citizens is not entitled to fees because it has failed to demonstrate that it actually paid the requested legal fees and expenses to Brown, Rudnick. This argument lacks merit, given that Stoll's affidavit specifically states that the itemized fees and costs sought have either already been paid by Citizens or are currently owed by Citizens to Brown, Rudnick.

Bishay next complains that Citizens seeks to collect fees and expenses which it was not obligated by contract to pay Brown, Rudnick. In accordance with Citizens' May 1995 outside Counsel Policies and Procedures Manual, Citizens generally does not pay for inter-office conferences; excessive review of files, memoranda and pleadings; or multiple lawyer attendance at meetings or depositions unless approved in advance. Further, Citizens does not pay for routine in-house

photocopying, telephone, telecopying and facsimile charges; secretarial overtime; or meals, unless necessitated by overnight travel. With respect to computerized research, Citizens will pay only for use charges. Brown, Rudnick was pre-approved to perform computerized research as necessary in connection with the present case.

Bishay asserts that "Approximately $100,000 was billed for review of pleadings, papers and files which Citizens expressly refuses to pay." Citizens' itemizations do indeed reveal a multitude of hours spent by Brown, Rudnick reviewing its own pleadings, memoranda and files. Nonetheless, after carefully examining the time records, this Court did not discern excessive hours spent reviewing documents.

Further, Citizens' itemized invoices reveal numerous hours spent conferencing between attorneys on the case. However, Citizens' protocol states with respect to inter-office conferencing that "only the time of the highest-paid participant will be paid for, then only when the conference advances the matter." It appears that Brown, Rudnick adhered to this policy in its invoices, because on any particular date, only one attorney, not both, billed for conferencing activity. Again, a review of the records does not reveal any obviously excessive hours spent in inter-office conferences, and in a complex case such as this one, involving more than one trial counsel, some conferencing is to be expected.

With respect to expenses, although the invoices set forth a total of $7,851.68 for "copies," it is only routine in-house photocopying for which Citizens will not pay. The only items

which do not appear to comport with Citizens' protocol are $57.64 in meals which is not accompanied by itemized overnight travel, and $129 in "misc. expenses" which is not sufficiently itemized given that the protocol states that Citizens will not pay for non-specific billing entries. Accordingly, this Court will reduce the expenses collected by Citizens by that amount.

Finally, Bishay contends that he should not have to pay approximately $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or those fees incurred by Citizens in resisting his June 12, 1997 motion to compel, which was granted. In general, a litigant must qualify as a prevailing party in order to receive an award of attorney's fees. *Bonofiglio v. Commercial Union Ins. Co.*, 412 Mass. 612, 613 (1992). However, this Court has found no authority for the proposition that a prevailing party's success should be gaged by each individual procedural step and/or motion rather than by the overall result achieved in the case. Accordingly, Citizens's fees need not be reduced by those hours spent unsuccessfully resisting Bishay's June 12, 1997 motion to compel.

Moreover, Citizens did prevail to a large extent on its first summary judgment motion, obtaining judgment in its favor on five out of six counts of the counterclaim and successfully opposing Bishay's cross-motion for partial summary judgment. More importantly, Citizens' failure to receive summary judgment on one count of Bishay's counterclaim does not render the work done in preparation for the motion unnecessary or unreasonable. This Court

concludes that the portion of the summary judgment motion on which Citizens did not succeed cannot be severed from the successful portions so as to permit a rational diminution of fees. See *Rini v. United Van Lines, Inc.*, 903 F. Supp. 234, 238 (D. Mass. 1995), rev'd on other grounds, 104 F.3d 502 (1st Cir. 1997).

As the Appeals Court has noted, "it is altogether appropriate that the person who, in doubtful circumstances, unleashes the dogs of war should bear the heavier burden of legal costs." *Strand v. Hubbard*, 31 Mass. App. Ct. 914, 915 (1991). In the present case, Bishay vigorously pursued his purported $100 million counterclaim against the bank to no avail, despite his clear contractual obligation to pay Citizens' collection costs in the event his claim was unsuccessful.

Accordingly, after careful review of Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court determines that Citizens Bank of Massachusetts has the right to recover $329,207.55 in reasonable attorneys fees and $31,220.44 in expenses/ costs incurred from April 25, 1996 through November 30, 1998 in connection with the claims of Bishay and 1095 Commonwealth Avenue Corp. against Citizens arising from transactions between Bishay, Commonwealth Avenue Corp. and Citizens.

Appendix D

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' motion for entry of separate and final judgment pursuant to Mass. R. Civ. P. 5a(b) be *DENIED*. It is further ORDERED that judgment shall enter for plaintiff Citizens Bank of Massachusetts for reasonable collection costs in the amount of three hundred sixty thousand, four hundred and twenty-seven dollars and ninety-nine cents ($360,427.99) jointly and severally against defendants Bahig Bishay, individually and as Trustee of the Old Post Realty Trust; Commonwealth Realty Trust; Hishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc.; Massachusetts Auto Group, Ltd.; and 1095 Commonwealth Ave. Corp.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Court

DATED: March 17, 1999

(3)

No. 06-1408

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY TO RESPONDENT'S OPPOSITION

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REPLY TO RESPONDENT'S OPPOSITION

The brief in opposition offers no justifiable reason to deny certiorari. Most of it is consumed by respondent's self-serving twist on the facts that not only has nothing to do with whether review is warranted, is furthermore inaccurate and otherwise unsupported by the record, and introduces hyper-technical, red-herrings that have nothing to do with the serious issues presented in the pending petition.

1. The petition for certiorari demonstrated that the Respondent, Citizen Bank of Massachusetts ("Citizens"), reported the actual conflict among the circuits, the various statutes and the state supreme courts—all in the following order: Mass. Gen. L. ch. 106, § 9-404 (1997); N.Y. UCC § 9-404 (McKinney 1997); Mass. Gen. L. ch. 183, § 55; N.Y. Real Prop. Acts. Law § 1921 (McKinney 1997); *In re Auto*

Specialties Manufacturing Co., 18 F.3d 358, 361 (6th Cir. 1994); *Duryea v. Third Northwestern National Bank of Minneapolis*, 606 F.2d 823, 826 (8th Cir.1979); *Apollo Travel Inc.*, 567 F.2d 841, 842 (8th Cir. 1977); and *Dick Warner* Cargo *Handling Corp. v. Aetna Business Credit inc.*, 746 F.2d 126 (2nd Cir. 1984). [Pet. App. at 11a-12a]

2. Petitioner Bahig F. Bishay ("Bishay"), merely brought this reported conflict to the attention of this Court, as the ultimate authority, in accordance with Rule 10[1]. The *public policy* question now at bar, which has become the law of the case *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96). [Pet. App. 11a-14a], is *Whether a Secured Lender *** May Refuse to Release Its Liens *** Even After Repayment*?

Here is what the respondent reported as a result of the entrenched split between the various authorities listed above:

> *"This issue recently arose in an unreported case in the U.S. Bankruptcy Court for the District of Massachusetts. In the matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay, Nos. 95-15015 and 95-16331 (Bank. Mass.; hearing of 4/23 and 4/27/96) (available from the author). In that case, the court addressed the lender's request to retain certain of its liens even after full debt payment pursuant to the Chapter 11 plan proposed by the lender, where the borrower has previously asserted state court lender liability claims against the lender.*

---

[1] Contrary to the respondent's apparent heartburn manifested in its repeated statements, purporting the petition did not include a basis under Rule 10 for the grant of certiorari, the split between the circuits, the statutes and the state supreme courts were all reported by the respondent, together with the *public policy* issues presented by the petitioner, certainly warrant this Court's intervention—as a favorable outcome would indeed reverse a very serious public detriment concocted by the respondent nearly ten years ago.

> *Under the terms of the lender's plan, the borrower would repay all outstanding principal, interest, costs and expenses currently due to the lender, as the borrower had refused to execute a release of its claims against the lender, the lender would retain its liens in order to secure payment of any costs that the lender would later incur defending the borrower's lender liability claims following confirmation. The borrower, of course, objected. In confirming the plan, the court held that, under the terms of the relevant loan documents, the lender's claim included the lender's future*[2] *contingent costs in connection with the debtor's state court claims against the lender. As a result, in order for the plan to be fair and equitable, the lender was entitled to retain liens on the debtor's property to secure those contingent claims in an amount sufficient to cover such contingent costs (which were estimated at $500,000).*" [Emphasis added] [Pet. App. 14a]

3. The record below confirms that the lender (the respondent) advanced this novel theory of *** *Refusing to Release its Liens Even After Repayment* *** well before the petitioner filed for bankruptcy protection in late 1995. The record below also demonstrates that the lender (the respondent) informed the petitioner in the summer of 1995 (months before the petitioned sought bankruptcy protection[3])

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[2] The actual record below, however, does not support any obligation on the part of the borrower to pay the lender any costs incurred well after the loan was repaid. The operative language, in fact, is as follows: *"Expenses of Collection. Each Guarantor shall pay to Lender on demand any and all expenses paid or incurred by Lender, including reasonable attorney's fees and disbursements, in connection with the collection or enforcement of the Obligations or this Guaranty.* As this Court will note, there was no mention of any future contingency after the loan is deemed "collected". [Supp. App. 5a]

[3] Protection that was not due to insolvency but, rather, to stave off the over-aggressive lending practices demonstrated by the respondent. The

of its unwillingness to discharge its liens on the petitioner's property, even after full repayment of the debt at issue, including the principal, the interest, and all of the lender's costs as of the actual date of repayment.

Contrary to the state appeals court's decision cited by the respondent in page-5 of its Brief in Opposition, which purports that Bishay did not actually tender[4] the $1.5 million balance owed in 1995, the record below in fact confirms that on September 21, 1995, Bishay provided the respondent with a commitment letter reflecting $1.5-$3.0 million available to Bishay, which required the respondent to release its liens on Bishay's property to enable Bishay to close that transaction and deliver approximately $1.5 million to the respondent. On November 1, 1995, Bishay delivered a backup commitment letter also requiring the respondent to confirm its willingness to release its liens on Bishay's property. Furthermore, on November 6, 1995, Bishay delivered yet another commitment letter also requiring the respondent to release its liens on Bishay's property. And, on November 9, 1995, Bishay's counsel wrote to the respondent and requested written assurances that it would in fact release its liens on Bishay's property upon receiving 100% of the loan balance. [Supp. App. 7a - 12a]

By a letter dated November 14, 1995, however, the respondent confirmed, in writing, its earlier oral responses, and unequivocally advised Bishay's counsel of its unwillingness

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record below actually confirms that the petitioned paid 100% to all of his creditors with no discounts, including Citizens.

[4] It was the respondent that advanced this last minute, desperate defense, where it suggested that Bishay should have brought a bag of cash ($1.5 million in cash) to see if the respondent was in fact serious about its stated refusal to discharge its liens. Obviously, this was very strained argument since a borrower customarily refinances or sells his/her property in order to repay the related debt. Erroneously, however, the state appeals court bought into the respondent's disingenuous argument.

to discharge its liens even after full repayment unless Bishay committed not to sue the respondent in the future. The respondent stated as follows:

> *"Thank you for your letter of November 9, 1995. As we have discussed, Citizens would be pleased to deliver a discharge of all mortgages, collateral documents, guaranties, and the like upon full and indefeasible payment of the entire amount of the indebtedness owed to Citizens by Mr. Bishay. Of course, to discharge those liens, Citizens will have to have reasonable assurances that all of that indebtedness has been indefeasibly paid in full, and that further secured indebtedness will not arise. At this point, given Mr. Bishay's stated intention to bring litigation against Citizens relating to Citizens' administration of these loans, and on the assumption that Citizens will incur significant expenses to defend that litigations, Citizens would not have reasonable assurances that the entire indebtedness of Mr. Bishay to Citizens has been indefeasibly paid in full unless that litigation has been resolved or Mr. Bishay commits not to bring that litigation and commits, in appropriate legal documents to do nothing else that would require Citizens to expend legal fees or other costs in connection with this relationship. If you continue to have any questions on this point, please call me".* [Emphasis added] [Supp. App. 13a]

4. As explained in more detail in the petition, Citizens demanded a *general release*, in addition to full repayment of the loan, to which it was not entitled, contractually, legally or equitably. The right to file a complaint against someone is a *constitutional right* and requires neither the placement of money in escrow; nor the maintaining of a lien on the ex-borrower's property, indefinitely—as the respondent alleged in its November 14, 1995 response, which has now become the law of the case. *Id.*

5. While it is clear that the respondent appears to be willing to do anything to keep intact the law it managed to conjure-up to date—for its benefit and the benefit of multitudes of similar secured lenders—for the most part, the statements made in the respondent's Brief in Opposition are simply misleading and not supported by the record below. In the interest of judicial economy, however, the petitioner will only address a few of these inaccuracies herein.

Resp. Opp. 6[5]:

> *"The rights and obligations between the parties were governed by Massachusetts law. The only interplay with federal law concerned the effect to be given a bankruptcy order (i.e. the Plan of Reorganization) in connection with claims emanating from that private banking relationship."* [Emphasis added]

The respondent here attempts to lead this Court to believe that it: (a) was a "private" banking institution; and (b) was not subject to federal jurisdiction.

The problem here is that the record below clearly confirms that the respondent was (and on information and belief continues to be) a "*federally regulated*" banking institution, subject to all federal rules. *See* Supplemental Appendix[6] 14a, which was Exhibit-18 of the deposition taken of the respondent's Chairman and Chief Executive Officer in 1998, Mr. Lawrence K. Fish. [Supp. App. 15a - 17a]. As this Court will note, Mr. Fish indeed executed the *Consolidated Reports of Condition and Income for A Bank With Domestic Offices Only and Total Assets of $300 Million or More—FFIEC 032—Report at the close of business September 30, 1997*, which was submitted to the following government agencies:

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[5] This Reply will reference the pages within the Respondent's Brief in Opposition as (Res. Opp. __).

[6] This Reply includes a Supplemental Appendix, which will cite the pages as follows: [Supp. App. ___]

(1) *Board of Governors of the Federal Reserve System OMB Number: 7100-0036*; (2) *Federal Deposit Insurance Corporation OMB Number: 3064-0052*; and (3) *Office of the Comptroller of the Currency OMB Number: 1557-0081*. When the respondent's counsel submitted his Brief in Opposition on May 24, 2007 to this Court, he and his client were presumed to know that their statements were disingenuous, at best.

6. The respondent now appears confused between the claims asserted in the state court in 1995, as amended in 1996, and the single, separate and distinct, "*$500,000 breach of contract*" claim asserted in the US District Court in 2005. This new breach of contract claim alleged that in 1999 (four years after the filing of the state court claim), Citizens abrogated its $500,000 agreement with Bishay, which was reflected in the confirmed reorganization plan and required Citizens to allow Bishay to freely persecute his claims once he put up the $500,000 in escrow. As the record below confirms, the claims asserted in the state court in 1995 and 1996 alleged that Citizens: (a) violated the covenant of good faith and fair dealing; (b) breached its contractual obligations[7]; (c) its misconduct constituted an unfair trade practice in violation of Mass. G.L., ch. 93A—warranting the award of multiple damages; (d) its conduct threatened Bishay with irreparable harm; (e) failed to act in a commercially reasonable manner; (f) deliberately tampered with real estate appraisals for its own financial gain; (g) concealed from Bishay and the Bankruptcy Court *two-tiered* fee agreements with its attorneys—in an attempt to enrich itself and its

[7] To avoid the potential for confusion, the petitioner respectfully points out that these were separate contractual obligations dealing with the terms of actual loan agreement and not the $500,000 agreement reflected in the confirmed plan of reorganization, which was the new cause of action asserted in the US District Court in 2005, and the subject of the appeal filed with the First Circuit.

attorneys; (h) filed false affidavits with the State and Bankruptcy Courts; (i) deliberately inflicted personal and financial distress on Bishay and his family; and (j) refused to accept full re-payment and refused to discharge its liens—which eventually forced Bishay to seek bankruptcy protection—and there was born the *new breach of contract* claim now at issue.

7. The respondent also appears to be confused between the petition filed with this Court in April 2003 and the pending petition filed in April, 2007. As this Court's records will confirm, the earlier petition was filed two years before Bishay asserted his new breach of contract claim in the US District Court in 2005. Furthermore, the petition filed with this Court in 2003 only dealt with a "reservation" clause within a confirmed plan of reorganization. As reflected in the Respondent's Appendix at 2a, the question presented in 2003 was *whether, notwithstanding 11 U.S.C. 1123(b)(3), a bankruptcy confirmation extinguishes a debtor's claims against a creditor despite the facts that (a) the plan of reorganization expressly *** preserves the debtor's right to pursue all claims he may have against that creditor, and (b) the creditor is indisputably aware that the claims have been preserved.* [Emphasis added]

8. As clearly articulated in the present petition, however, the primary question presented is whether *a Secured Lender May Refuse to Release Its Liens After Repayment;* and the secondary question is whether the District Court and the First Circuit erred when they did not recognize the confirmed plan as a "*contract*" between Bishay and Citizens?

Unable to muster a credible answer to the conflict the respondent itself reported, the respondent resorted to what appears to be hyper-technical reasons why this Court should not grant certiorari. Reasons that have nothing whatsoever to do with the merits of the serious questions pending before this Court now. There is accordingly no merit to the respondent's

contention that this case does not present the important, entrenched conflict among the circuits, the various statutes and state supreme courts, as to whether a lender can lawfully refuse to discharge its liens upon receiving full repayment of the respective debt?

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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May 31, 2007

APPENDIX A

GUARANTY

This GUARANTY is made as of the 16th day of September, 1994 by MASSACHUSETTS AUTO GROUP LTD. d/b/a BISHAY ISUZU, a Massachusetts corporation with an address of 75 Providence Highway, Walpole, Massachusetts and U.S. AUTO EXCHANGE GROUP LTD., a Massachusetts corporation with an address of 75 Providence Highway, Walpole, Massachusetts and 1095 Commonwealth Avenue Corp, a Massachusetts corporation with an address of 75 Providence Highway, Walpole, Massachusetts (collectively the "Guarantor"), for the purpose of inducing CITIZENS BANK OF MASSACHUSETTS, a banking institution with an address of 55 Summer Street, Boston, Massachusetts (the "Lender"), to amend the terms of a loan in the current principal amount of Two Million Three Hundred and Thirty Thousand Six Hundred Sixty DOLLARS ($2,330,660) (the "Loan") to Bahig F. Bishay, an individual with a principal place of business at 75 Providence Highway, Walpole, Massachusetts 02032, (the "Borrower"). The Loan is evidenced by a demand promissory note (the "Note") of the Borrower dated June 8, 1988 in the original principal amount of $2,560,000 and a Credit Agreement (the "Credit Agreement") dated June 8, 1988, between Neworld Bank, predecessor to Lender, and Borrower and is secured by a (i) a Mortgage and Security Agreement (the "Bishay Mortgage") dated June 8, 1988, between the Borrower and the Bank relating to a property at 75 Providence Highway, Walpole, Massachusetts; (ii) a Guaranty (the "Company Guaranty") dated June 8, 1988, by Bishay Motors and Leasing, Inc. (formerly known as Bishay Motors, Inc.) (the "Company"); (iii) a Security Agreement (the "Security Agreement") dated June 8, 1988 between the Company and the Bank; (iv) a Guaranty (the "Post Guaranty") dated August 27, 1990 by Bahig F. Bishay, Trustee of Old Post Road Realty Trust; (v) a Mort-

gage (the "Post Mortgage") dated August 27, 1990 relating to a parcel of registered land in Sharon and Walpole, Massachusetts on Old Post Road; (vi) a Guaranty (the "Commonwealth Guaranty") dated August 27, 1990 by Bahig F. Bishay, Trustee of Commonwealth Realty Trust; and (vii) a Mortgage (the "Commonwealth Mortgage") dated August 27, 1990, relating to eight (8) parcels of land on or near Commonwealth Avenue, Boston, Massachusetts. The Credit Agreement, Note, Bishay Mortgage, Company Guaranty, Security Agreement, Post Guaranty, Post Mortgage, Commonwealth Guaranty, Commonwealth Mortgage, all as amended, including, without limitation, by letters dated March 15, 1991, October 16, 1991, October 23, 1991, December 27, 1991, July 8, 1992, December 30, 1992, August 10, 1993, September 13, 1993, November 1, 1993 and July 27, 1994, and all other instruments, whether now existing or hereafter arising, executed in connection with the Loan or any extension or modification thereof or submitted to Lender are collectively referred to herein as the "Loan Documents."

In consideration of the foregoing, each of the undersigned agrees:

1. Guaranty. Each Guarantor, jointly and severally, unconditionally guarantees to Lender prompt and full payment and performance when due of all of the Borrower's present and future indebtedness and obligations under the Loan Documents. All such indebtedness and obligations are referred to in this Guaranty as the "Obligations." Each Guarantor's liability hereunder is direct and unconditional and may be enforced after nonpayment or nonperformance by the Borrower of any of the Obligations without requiring Lender to resort to any other person or entity (including, without limitation, the Borrower) or any other right, remedy or collateral.

2. Rights of Lender. Each Guarantor authorizes Lender to alter at any time, in Lender's discretion, any of the terms of

the Obligations, to take and to hold any security for the Obligations and to accept additional or substituted security, to subordinate, compromise or release any security, to release the Borrower from its liability for all or any part of the Obligations, to release any Guarantor hereunder or to substitute or add one or more guarantors or endorsers hereunder, and to assign this Guaranty in whole or in part. Lender may take any and all of the foregoing actions upon such terms and conditions as Lender may elect, without giving notice to any Guarantor or obtaining the consent of any Guarantor and without affecting the liability of any Guarantor to Lender.

3. Joint, Several and Independent Liability. The obligations of each Guarantor under this Guaranty are joint and several and independent of the obligations of the Borrower. Lender may release or settle with the Borrower or any Guarantor at any time without affecting the continuing liability of any Guarantor. Lender may proceed against any Guarantor under this Guaranty without first proceeding against the Borrower, against any other Guarantor or any other person or any security held by Lender and without pursuing any other remedy. Lender's rights under this Guaranty will not be altered or exhausted by any action by Lender until all of the Obligations have been paid, performed and satisfied in full.

4. Waiver of Indulgence. Automatic Reinstatement of Guaranty. Each Guarantor waives notice of acceptance of this Guaranty and all presentment, demand, protest, notice of protest and notices of default or dishonor of any note or other obligation guaranteed hereby and all other suretyship defenses generally. No extension of time or other indulgence or release of liability or collateral granted by Lender to the Borrower or to any Guarantor will release or affect the obligations of the Guarantor hereunder and no act, omission or delay on the part of Lender in exercising any rights hereunder or in taking any action to collect or enforce payment or performance of any of the Obligations shall be a waiver of any

such right or release or affect the Obligations. This Guaranty shall not be impaired by any bankruptcy, insolvency, arrangement, assignment for the benefit of creditors, reorganization or other debtor relief proceedings under any federal or state law, whether now existing or hereafter enacted, with respect to Borrower or any Guarantor or if for any other reason Borrower or any other Guarantor has no legal obligation to discharge any of the Obligations. Each Guarantor agrees that to the extent Borrower makes any payment or payments to Lender which payment or payments or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required, for any of the foregoing reasons or for any other reason, to be repaid or paid over to a custodian, trustee, receiver, or any other party under any bankruptcy act, state or federal law, common law or equitable cause, then to the extent of such payment or repayment, the Obligations or part thereof intended to be satisfied shall be automatically revived and continue in full force and effect as though such payment had not been made and Guarantor shall be primarily liable for the Obligations. Guarantor shall have no authority to revoke this Guaranty, but if any such revocation shall be deemed to have occurred by operation of law or otherwise, the provisions of this Guaranty shall continue to apply notwithstanding such revocation to the maximum extent permissible under applicable laws.

5. Subordination of Rights. Each Guarantor covenants and agrees that any indebtedness of the Borrower to Guarantor, whether arising from payments made by the Guarantor pursuant to this Guaranty or otherwise, is hereby subordinated to the Obligations and that after any default under the Note or any of the other Loan Documents, each Guarantor shall hold any funds received from Borrower in trust for Lender to satisfy the Obligations. This subordination of the indebtedness and other obligations shall continue until all of the Obligations have been paid, performed and satisfied in full. Nothing in this Section shall prevent any Guarantor

from enforcing and collecting any obligation owed to such Guarantor by the Borrower prior to a default under the Note or after the Obligations have been paid, performed and satisfied in full.

6. Waiver of Subrogation. Each Guarantor hereby waives any right of subrogation with respect to any claim of Lender against Borrower which is satisfied by payment or performance rendered by Guarantor.

7. Default. Lender may declare all of the Guarantors in default under this Guaranty if any Guarantor fails to perform any of its obligations under this Guaranty or under any other guaranty given to Lender in connection with the Loan, or becomes the subject of any bankruptcy, insolvency, assignment for the benefit of creditors, arrangement, reorganization, or other debtor relief proceeding under any federal or state law, whether now existing or hereafter enacted.

8. Delay: Cumulative Remedies. No delay or failure by the Lender to exercise any right or remedy against the Borrower or any Guarantor will be construed as a waiver of that right or remedy. All remedies of Lender against the Borrower and each Guarantor are cumulative.

9. Expenses of Collection. Each Guarantor shall pay to Lender on demand any and all expenses paid or incurred by Lender, including reasonable attorneys' fees and disbursements, in connection with the collection or enforcement of the Obligations or this Guaranty. Until paid to Lender, such sums will bear interest at the default rate set forth in the Note.

10. Entire Agreement. The whole of this Guaranty is set forth herein, and there is no verbal or other written agreement, and no understanding or custom affecting the terms hereof. This Guaranty can be modified only by a written instrument signed by the parties to be charged.

11. Interpretation and Binding Effect. If any provision of this Guaranty shall be held to be prohibited or invalid under

applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty. This Guaranty shall be governed and construed pursuant to laws of The Commonwealth of Massachusetts and shall take effect as a sealed instrument and shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto.

MASSACHUSETTS AUTO GROUP LTD. d/b/a BISHAY ISUZU,

/s/ Judith R. Pike
Witness

By /s/ Bahig F. Bishay
Bahig F. Bishay
President and Treasurer

U.S. AUTO EXCHANGE GROUP LTD.,

/s/ Judith R. Pike
Witness

By /s/ Bahig F. Bishay
Bahig F. Bishay
President and Treasurer

1095 COMMONWEALTH AVENUE CORP.

/s/ Judith R. Pike
Witness

By /s/ Bahig F. Bishay
Bahig F. Bishay
President and Treasurer

APPENDIX B

[LOGO] FIRST FINANCIAL

September 21, 1995

Dear Bahig:

Richard and I enjoyed meeting with you yesterday. Most of my deals are smaller residential deals. Most of Richard's are development deals with equity participation.

We would suggest the following:

1. We would lend you a minimum of $1.5MM up to a maximum of $3MM.

2. We would charge 12% interest with 3 points. Payments would be interest only. No prepayment penalty.

3. We would receive warrants (with anti-dilution provisions) on a minimum of 2% of the stock at 1/3 public offering price (or a comparable value if no public offering). The number of warrants would increase prorate up to 3% if we lent the entire $3MM. The warrants would be exercisable for 3 years.

4. We can be flexible about the term.

5. We would require collateral such that we are confident the collateral equals 200% of the loan amount.

Your paying us with warrants is consistent with your aim of tying your costs to your revenues—such as your outsourcing many of your activities. This keeps you from stranging on fees and overhead.

Please contact me with any questions.

I look forward to speaking with you soon. Have fun in Chicago.

Dan Jacobson /s/
cc: Mark Robinson, VIMAC

APPENDIX C

[RFP LOGO]

November 1, 1995

Via Facsimile
(617) 783-5000

B. Bishay
President
U.S. Auto Exchange
1095 Commonwealth Avenue
Boston, MA 02215

Re: Realty Financial Partners Limited Partnership

Dear Mr. Bishay:

In furtherance of our discussions regarding the refinancing of your existing debt with Citizens Bank ("Citizens"), I am writing to outline very general terms and conditions under which Realty Financial Partners Limited Partnership ("RFP") would underwrite the refinancing of your Citizens debt. As we have not had any substantive discussions about the specifics of this transaction, underlying collateral, and deal structure, it is difficult to be any more specific at this time. Further, without a complete underwriting of the transaction, it is impossible to quote required returns or collateral required prior to outlining any specific terms. However, in the interest of giving you a general overview I offer the following:

General: RFP can advance up to $1.5 million to be secured with first mortgage liens on real estate collateral. Generally, RFP acquires the existing underlying loan documents and agrees to new business terms with the Borrower through a newly executed forbearance agreement between Borrower and RFP. Since the Citizens loan would apparently be bifurcated between two lenders, new loan documents will likely have to be executed.

Structure: Borrower shall hold title to the properties in a single asset corporation or partnership with a corporate general partner, whose by-laws shall provide for (i) a director to be appointed by RFP and (ii) unanimous consent by the Board of Directors to place the Borrower into bankruptcy. The Borrower shall further place the deeds to the property in escrow subject to default provisions as outlined.

Collateral Value: RFP may advance up to 85% of its estimated collateral value on income producing property. RFP will review its own collateral valuations as part of its due diligence process.

Debt Service: RFP will require current debt service payments of 12% with a yield enhancement mechanism to receive a minimum annual return of 20% on an IRR basis. Yield requirements are entirely driven by the underwriting of the transaction. RFP typically receives its yield enhancement through the recovery of a portion of the discounted face value of the underlying obligation purchased by RFP.

Real Estate Taxes: All taxes must be paid currently, and current taxes escrowed on each collateral property.

Closing Costs: Borrower shall pay all of RFP's out-of-pocket costs associated with this transaction.

Recourse: Non-recourse except for standard industry carve-outs (i.e., environmental, fraud, etc.) and any bankruptcy filing on behalf of Borrower.

Conditions: Closing shall be conditioned upon satisfactory completion of RFP's due diligence RFP Partners' approval, and acceptable loan documentation.

Commitment Deposit: A $20,000 good faith deposit shall be required with the commitment letter to complete RFP's legal due diligence and any other out-of-pocket due diligence costs. This deposit, less any out-of-pocket costs, shall be returned in the event this transaction does not close.

Closing Date: A closing date shall be set ten (10) business days from RFP receiving a $25,000 funding deposit from Borrower. Said deposit shall be returned to Borrower at the closing of the transaction but shall be non-refundable in the event the transaction does not close for any reason other than a default by RFP.

After you have had the opportunity to review the same, please call so we can discuss the transaction in further detail.

Sincerely,

/s/ Michael J. Walton
Michael J. Walton
Senior Vice President

cc: Mr. Stephen Brackett

APPENDIX D

HAYMARKET BANK
FANEUIL HALL
BOSTON

November 6, 1995

Mr. Bahig Bishay
U.S. Auto Exchange
1095 Commonwealth Avenue
Boston, MA 02215

Dear Mr. Bishay:

Please be advised that at a recent meeting of our Board of Directors, it was voted to grant to you a loan of 1.5 million dollars under certain terms and conditions previously discussed with you. As I have explained, of paramount importance was Haymarket being able to purchase your current obligation from Citizen's Bank at a discount of no less than 10%.

As Citizen's is not at all interested in granting a discount, I'm afraid our approval is no longer valid. However, I plan to discuss with the Board, your amended loan request at its meeting of November 21, 1995. I shall call you the following day.

Very truly yours,

/s/ Richard J. Kennedy
Richard J. Kennedy
Executive Vice-President

APPENDIX E

SEEGEL ROBINSON & LIPSHUTZ, P.C.
ATTORNEYS AT LAW
WELLESLEY OFFICE PARK
20 WILLIAM STREET
WELLESLEY, MASSACHUSETTS 02181
TELEPHONE: (617) 287-4400
FAX: (617) 235-9300

November 9, 1995

Steven J. Mastrovich, Esq.
Brown, Rudnick, Freed & Gesmer
One Financial Center
Boston, MA 02111

Re: Bahig F. Bishay/Citizens

Dear Steve:

I am writing to confirm one point.

Citizens is in the process of determining and confirming to Bahig exactly the amount that Citizens claims pursuant to the note and loan documents.

Assume that the amount as of a particular date is $X and that on that particular date (and with appropriate Bankruptcy Court approval) a closing occurs with a source of financing that provides for $x to be paid to Citizens upon recording.

Please confirm that Citizens will deliver at the closing: (1) Bahig's original note and all original guarantees, and (2) releases, discharges and all other proper and customary documents necessary to relinquish all the mortgages, liens and security interests that Citizens holds.

Very truly yours,

/s/ Terry
Edward T. Robinson

APPENDIX F

[LOGO] BROWN RUDNICK FREED & GESMER

Edward T. Robinson, Esquire
Seegel, Robinson & Lipshutz, P.C.
20 William Street
Wellesley, MA 02181

November 14, 1995

Re: Citizens Bank/Bahig Bishay

Dear Terry:

Thank you for your letter of November 9, 1995. As we have discussed, Citizens would be pleased to deliver a discharge of all mortgages, collateral documents, guaranties and the like upon full and indefeasible payment of the entire amount of the indebtedness owed to Citizens by Mr. Bishay. Of course, to discharge those liens, Citizens will have to have some reasonable assurance that all of that indebtedness has been indefeasibly paid in full, and that further secured indebtedness will not arise. At this point, given Mr. Bishay's stated intention to being litigation against Citizens relating to Citizens' administration of these loans, and on the assumption that Citizens will incur significant expenses to defend that litigation, Citizens would not have reasonable assurances that the entire indebtedness of Mr. Bishay to Citizens has indefeasibly paid in full unless that litigation has been resolved or Mr. Bishay commits not to bring that litigation and commits, in appropriate legal documents, to do nothing else that would require Citizens to expend legal fees or other costs in connection with this relationship.

If you continue to have any questions on this point, please call me: Thank you.

Very truly yours,

BROWN RUDNICK FREED
& GESMER, P.C.
By: /s/ William R. Baldiga
William R. Baldiga

BEST AVAILABLE COPY

EXHIBIT 18
Denise C. MacKay
Date: 6/17/98

Federal Financial Institutions Examination Council

Board of Governors of the Federal Reserve System
OMB Number: 7100-0036
Federal Deposit Insurance Corporation
OMB Number: 3064-0052
Office of the Comptroller of the Currency
OMB Number: 1557-0081
Expires March 31, 2000

Please refer to page i, Table of Contents, for the required disclosure of estimated burden.

1

Consolidated Reports of Condition and Income for A Bank With Domestic Offices Only and Total Assets of $300 Million or More—FFIEC 032

Report at the close of business September 30, 1997 (970930) (RCRI 9999)

This report is required by law: 12 U.S.C. §324 (State member banks); 12 U.S.C. §1817 (State nonmember banks); and 12 U.S.C. §161 (National banks).

This report form is to be filed by banks with domestic offices only. Banks with foreign offices (as defined in the instructions) must file FFIEC 031.

NOTE: The Reports of Condition and Income must be signed by an authorized officer and the Report of Condition must be attested to by not less than two directors (trustees) for State nonmember banks and three directors for State member and National banks.

I, David S. Anderson, Senior Vice President and Controller
Name and Title of Officer Authorized to Sign Report

of the named bank do hereby declare that the Reports of Condition and Income (including the supporting schedules) for this report date have been prepared in conformance with the instructions issued by the appropriate Federal regulatory authority and are true to the best of my knowledge and belief.

David S. Anderson
Signature of Officer Authorized to Sign Report

11/20/97
Date of Signature

The Reports of Condition and Income are to be prepared in accordance with Federal regulatory authority instructions.

We, the undersigned directors (trustees), attest to the correctness of the Report of Condition (including the supporting schedules) for this report date and declare that it has been examined by us and to the best of our knowledge and belief has been prepared in conformance with the instructions issued by the appropriate Federal regulatory authority and is true and correct.

Director (Trustee) Lawrence K. Fish

Director (Trustee) Herbert W. Cummings

Director (Trustee) Scott A. Kisting

Submission of Reports

Each bank must prepare its Reports of Condition and Income either:

(a) in automated form and then file the computer data file directly with the banking agencies' collection agent, Electronic Data Systems Corporation (EDS), by modem or on computer diskette; or

(b) in hard-copy (paper) form and arrange for another party to convert the paper report to automated form. That party (if other than EDS) must transmit the bank's computer data file to EDS.

To fulfill the signature and attestation requirement for the Reports of Condition and Income for this report date, attach this signature page to the hard-copy record of the completed report that the bank places in its files.

FDIC Certificate Number [| | | | |] (RCRI 9050)

CALL NO.: 201 S32 09 30-97
STBK: 25-0305 09801 STCERT: 25-18562
CITIZENS BANK OF MASSACHUSETTS
55 SUMMER STREET
BOSTON, MA 02110

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. Superior Court Department
Civil Action No. 95-1312-A

CITIZENS BANK OF MASSACHUSETTS,
Plaintiff

vs

BAHIG BISHAY, INDIVIDUALLY AND AS TRUSTEE OF OLD POST ROAD REALTY TRUST BISHAY MOTORS & LEASING INC., F/K/A BISHAY MOTORS, INC., MASSACHUSETTS AUTO GROUP, D/B/A BISHAY ISUZU, U.S. AUTO EXCHANGE GROUP LTD. AND 1095 COMMONWEALTH AVE. CORP.,
Defendants

DEPOSITION OF: LAWRENCE FISH

Catuogno Court Reporting
10 Commercial Wharf
Boston, MA 02110

June 17, 1998

APPEARANCES:

Representing the Plaintiff:

BROWN, RUDNICK FREED & GESMER, P.C.,
One Financial Center
Boston, Ma 02111
BY: JAMES W. STOLL, ESQ.
(617) 856-8200

Representing the Defendant,

LAW OFFICES OF HAROLD BROWN
66 Long Wharf
Boston, MA 02110
BY: L. MICHAEL HANKES, ESQ.
(617) 720-4200

ALSO PRESENT: Bahig Bishay, Plaintiff
Edward V. Barrett, Sr. Vice President/
Counsel Citizens Bank

* * * *

[22] Q. Okay. And after you—after the Bank of New England failure, where did you go?

A. Well, after the Bank of New England failure, I was asked by the United States Government and the FDIC to run the bank, the bridge bank on their behalf, so I stayed as chairman and chief executive officer working for the FDIC.

Q. Okay.

A. I did that until the summer of 1991 when the bank was sold to Fleet. Then I took time off, did community service work and began my new job at the Citizens Bank in April of 1992.

Q. Okay. And in April of 1992, what was your new job at Citizens Bank?

A. I was president, and I held that job until the late fall of that year when I became chairman and chief executive officer?

Q. At that point in time, you were an officer or director of that bank, correct?

A. I was both.

Q. You were both. And when you say that you were president of Citizens Bank in

* * * *

[137] your statements refusal to and $10 million, and you're asking me to digest a great deal here, which I've really have not had time to—to look at.

Q. The Federal Government imposes reporting requirements on banks for potential liabilities, does it not?

A. Well, our accountants impose that on us. We print certified statements of account.

(Exhibit 18, September 30, 1997 Certified Statement of Account, marked for identification.)

Q. (By Mr. Hankes) Mr. Fish, I'm. going to show you a document which has been marked as Exhibit No. 18 and ask you if that's not one of those certified reports for Citizens Bank of Massachusetts for business closing as of September 30th, 1997.

A. This is a report that we would have submitted, yes.

Q. And as of September 30th, 1997, you signed that as director and in parens trustee, [138] correct?

A. Correct.

Q. Actually, it says as of September 30th, but it's—there's a date of signature appearing on the left-hand side of November 20th, 1997, correct?

A. There is such a date, yes.

Q. All right. Wouldn't this report have to include a potential liability of the $100 million that's claimed by Mr. Bishay in Exhibit No. 17?

MR. STOLL: Is your question, Mike, must it include or did it include it?

MR. HANKES: Shouldn't it include it?

A. Not necessarily.

Q. (By Mr. Hankes) Not necessarily. Does that report as of September 30th, which appears a November 20th date include that potential liability?

A. I don't know. I'd have to read it page by page.

Q. Okay.

* * * *